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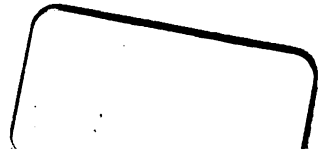

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JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ALEXANDER JAMES COCKBURN, Knt., Ld. C. J.

The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
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TEMPLE, January 11th, 1857.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1856.

The Judges who usually sat in Banc in this Term were:
CRESSWELL, J., CROWDER, J., and WILLIAMS, J.

MEMORANDA.

ON Saturday, the 1st of November, 1856, The Right Honourable Sir John Jervis, Knight, Lord Chief Justice of Her Majesty's Court of Common Pleas, died at his residence in Eaton Square.

In consequence of this event, no business was transacted in Court on the first day of Term.

On the same day, the Hon. Mr. Baron Platt, one of the Barons of Her Majesty's Court of Exchequer, resigned his seat, and was succeeded by William Henry Watson, Esq., one of Her Majesty's counsel learned in the law, who on the 6th of November appeared at the Bar of the Court of Common Pleas and counted in a writ of dower unde nihil habet, and took the oaths and his seat in the *Court of Exchequer on the 8th of November, and shortly afterwards received the honour of Knighthood. [*2

He gave rings with the motto "Militavi."

On the 19th of November, the Hon. Sir Alexander James Edmund Cockburn, Knight, Her Majesty's Attorney-General, was appointed Lord Chief Justice of the Court of Common Pleas, in the room of the late Sir John Jervis, Knight, deceased.

He appeared at the Bar of that Court on the 21st of November, and counted in a writ of dower unde nihil habet, and on the following day took the oaths and his seat.

He gave rings with the motto, "Fiat justitia."

Sir Richard Bethell, Knight, Her Majesty's Solicitor-General, was on the 22d of November appointed to the office of Her Majesty's Attorney-General, vacated by the elevation of Sir Alexander James Edmund Cockburn to the Bench of the Court of Common Pleas.

The Right Hon. James Alexander Stuart Wortley, of the Inner Temple, one of Her Majesty's counsel learned in the law, and Recorder of London, was on the same day appointed to the office of Her Majesty's Solicitor-General, vacated by the promotion of Sir Richard Bethell to the office of Attorney-General.

*3] *REGISTRATION APPEALS.

(UNDER 6 & 7 VICT. C. 18.)

City and Borough of HEREFORD.

ALEXANDER CHASTEL DE BOINVILLE, Appellant.
WILLIAM ARNOLD, Respondent. *Nov.* 10.

Serjeants-at-mace appointed by a corporation, under the provisions of its charter, with a salary paid by the treasurer, out of the fund of the corporation, are not "constables appointed for the borough under the 5 & 6 W. 4, c. 76," so as to be prohibited from voting in the election of members of parliament by the 19 & 20 Vict. c. 69, s. 9, although their original appointment takes place subsequently to the passing of the first-mentioned statute.

AT a court held on the 3d of October, 1856, to revise the lists of voters in the election of members of parliament for the city and borough of Hereford, Alexander Chastel de Boinville duly objected to the name of William Arnold being retained in the list of freemen entitled to vote in the election of members for the said city and borough. The facts established by the evidence in the case were these:—

The said William Arnold was on the last day of July, 1856, one of the serjeants-at-mace appointed by the corporation of Hereford. He was first appointed to his office in the month of December, 1851, and has received his salary by payment of the treasurer of the corporation of Hereford. *It was and is part of his duty to serve summonses for juries and summonses issued by the magistrates of the said city and borough, and to execute warrants, apprehend prisoners, and assist in keeping the peace.* These warrants were addressed to the "constables

and other peace-officers of the city;" and he had, as such serjeant-at-mace, taken the oath hereinafter set forth.

The revising-barrister found, that the corporation of Hereford had, previous to the passing of the Municipal *Corporation Reform Act (5 & 6 W. 4, c. 76), pursuant to the charter of the said city and borough, appointed serjeants-at-mace; that the serjeants so appointed had always taken the same oath as the present serjeants, their duties being similar; that they acted as police-constables and conservators of the peace, executing warrants, serving summonses, and apprehending prisoners; and that they all discharged certain duties in the Mayor's Court (which court has since been abolished, by 9 & 10 Vict. c. 95), and had to attend the mayor on processions and on other state occasions; that, on the passing of the Municipal Corporation Reform Act, the corporation reduced the number of serjeants-at-mace for the city to three, and, when vacancies occurred by the death or resignation of the then serjeants-at-mace, the corporation appointed others (to the number of three) to succeed them, and the persons thus appointed discharged the same offices as the old officers; that the sergeants-at-mace have been appointed annually, ever since the passing of the Municipal Corporation Reform Act, at the general meeting of the corporation in the month of November in each year; and that the appointment has never been made since the passing of the Municipal Corporation Reform Act on the day named in the charter, but always on the 9th of November. [*4

The serjeants-at-mace are sworn as follows:—

"1. You and every of you shall well and truly observe the office of serjeantship-at-mace within the city of Hereford, suburbs, and liberties of the said city, as long as you shall continue and occupy the said office and be in the same:

"2. Item. You shall make true attachments of all manner of actions, and make true returns of the same actions at the next court following, without any concealment:

"3. Item. All warrants and precepts to you directed *and commanded by the mayor, as well by writing as by word of mouth, you shall truly execute according to your powers, and true return make of the same: [*5

"4. Item. All sums of money as amerciaments, fines, and forfeitures, and all other things which you shall be charged with by reason of your office, or that shall come into your hands, you shall truly levy and gather, and true return and accounts make of the same to Mr. Mayor; and you shall come and yield your accounts at such time as you shall be called upon:

"5. Item. The council of the mayor you shall truly keep, and obey his commandments in every lawful thing touching your offices, as well by night as by day, to the best of your powers; and you shall see the King's Majesty's peace observed and kept duly and truly at all times

within the said city and liberties thereof, to the best and utmost of your powers, as long as you shall continue and be in the said offices:

"6. Item. You shall do no extortion or oppression to the King's people, nor receive any moneys which belongeth to the mayor, but show him thereof, and true deliverance make of the same to him forthwith upon the receipt thereof:

"7. Item. You shall not suffer any person arrested by you to go at large, directly or indirectly, until he hath given sufficient bail; and, if he cannot procure bail within twenty-four hours after he is arrested, you shall deliver him into the custody of the gaoler, there to remain until he give bail, or be legally discharged:

"8. Item. You shall well and truly behave yourselves in making of juries, as well between our sovereign lord the King's highness and the party, as between party and party, having no respect to one party more than to the other, but to be indifferent in returning the same juries, without any partiality; and all things appertaining to your
*6] office to be done, you shall execute and do to the utmost *of your power during the same time, all favour and malice and affection set apart. So help you God."

The present serjeants-at-mace are, the voter, William Arnold, Francis Woodhouse Hollings, and Charles Morgan (hereinafter referred to), who have all been appointed since the passing of the Municipal Corporation Reform Act, and who were sworn in in November, 1854, but have not since been sworn.

The serjeants-at-mace have received the fees on execution of warrants allowed by law to constables.

Since the passing of the Municipal Corporation Reform Act, a police-force has been appointed by the watch-committee, under the authority of the 76th section of the act. The force consists of about sixteen men, headed by a superintendent. They perform all the ordinary duties of police-constables; but the serjeants-at-mace have also continued to perform their duties as before.

The charter before referred to,—which was granted by King William the Third,—contains the following provisions respecting the appointment and duties of serjeants-at-mace and other officers:—

"And also we will, and by these presents, for us, our heirs and successors, do grant to the aforesaid mayor, aldermen, and citizens of the city aforesaid, and their successors, That the aforesaid mayor, aldermen, and chief citizens, being the common council of the city aforesaid for the time being, or the major part of them, may elect, nominate, and appoint from time to time in all future times, yearly, on the said Monday after the aforesaid feast of St. Michael the Archangel, two men of the common council of the city aforesaid who shall be chamberlains of the same city:

"And also so many and such *constables* and other inferior officers

and ministers within the city aforesaid, as the citizens and governors of the aforesaid city before the date of these presents have had and were accustomed *to have within the same city and liberties thereof, if to the same mayor, aldermen, and common council it [*7 shall seem to be necessary and expedient; and that such ministers or officers so to their offices being severally elected, appointed, and named, shall in due manner be sworn to execute their offices rightly, well, and faithfully in all things touching that office, before the mayor and aldermen of the city aforesaid for the time being, or the major part of them, of whom the aforesaid mayor we will to be one; and that they, so elected and appointed, may severally have and exercise their offices at the pleasure of the same mayor, aldermen, and chief citizens of the city aforesaid, or the major part of them, for the time being:

"And also we will, and by these presents, for us, our heirs and successors, do ordain and grant to the aforesaid mayor, aldermen, and citizens of the city aforesaid, and their successors, that they for ever hereafter may have, and that there may and shall be in the city of Hereford, five other officers, to wit, one officer who shall be and shall be called bearer of our sword before the mayor of the city aforesaid, and four other officers who shall be and shall be called serjeants-at-mace, for the execution of processes, mandates, and other businesses to the offices of serjeants-at-mace in the city aforesaid and the liberties of the same belonging, from time to time to be executed and performed; which sword-bearer and serjeants-at-mace shall be appointed, named, and chosen by the aforesaid mayor, aldermen, and common council of the city aforesaid, or by the major part of them, yearly, on Monday next after the feast of St. Michael the Archangel; and that they and every of them shall be attending from time to time upon the mayor of the city aforesaid for the time being; and that the aforesaid sword-bearer and four serjeants-at-mace so to be chosen and named shall be sworn in due manner well and faithfully *to execute their offices aforesaid, before the mayor, aldermen, and common council of [*8 the city aforesaid, or the major part of them, for the time being, of whom the mayor for the time being we will to be one; and that, after such oath so taken, they may, shall, and ought to execute that office for one whole year then next ensuing, so that they shall well behave themselves in the offices aforesaid:

"And we will, and by these presents, for us, our heirs and successors, do grant to the same mayor, aldermen, and citizens of the city aforesaid, and their successors, that they and their successors for ever hereafter may have and hold, and shall and may have and hold, in the Guildhall of the same city, one court of record, every Monday and Thursday in every week, yearly, to be held before the mayor of the city aforesaid for the time being, and, in the absence of the said mayor, before one alderman of the city aforesaid for the time being, to be

deputed by the same mayor for the time being; and that, in the same court, they may hold, by plaint to be levied in the same court, all and all manner of pleas, actions, suits, and demands of whatsoever trespasses with force and arms or otherwise, in contempt of us, our heirs and successors, done or to be done, and of whatsoever other trespasses, faults, and offences within the city aforesaid, the suburbs and liberties, limits, and precincts of the same, done, moved, arising, had, or committed, and hereafter to be done, moved, or committed, of all and all manner of pleas upon the case, and of all and all manner of debts, accompts, covenants, receipts, detaining of charters, writings, and muniments, and chattels, taking and detaining of cattle and chattels, and other contracts from whatsoever causes or things, within the city aforesaid, suburbs, limits, and precincts thereof, arising or happening, and of all other actions whatsoever, personal and mixed: and that, as often as *any person or persons shall be willing to implead any other person or persons whatsoever possessing or holding lands, tenements, rents, or hereditaments within the aforesaid city and suburbs, limits and precincts, of the same lands, tenements, rents, and hereditaments, that, so often as he or they so being willing to implead shall sue out our writ of right patent, to be issued forth of our Court of Chancery of England, to be directed to the aforesaid mayor of the city aforesaid,—upon which writ in the court aforesaid, before the mayor of the city of Hereford aforesaid for the time being, and, in the absence of the said mayor, before one of the aldermen of the said city for the time being, deputed by the said mayor for the time being, he or they so as aforesaid being willing to implead shall make their protestation to prosecute their complaint upon the writ aforesaid made, in the nature of a writ of assize of novel disseisin, mort d'ancestre, attaint, or in the nature of any other action or writ whatsoever at common law, as the matter and case demands and requires, and as the manner there is; and that such pleas, complaints, and actions, as well real as personal and mixed, shall be there heard and determined before the mayor of the said city aforesaid for the time being, or, in the absence of the said mayor, before one of the aldermen of the city aforesaid for the time being, by the said mayor for the time being to be deputed, in the Guildhall of the same city, by such and the like proceedings and manner, according to the law and custom of our kingdom of England by which and as shall be agreeable to our law, and in as ample and the like manner and form and as in any other court of record in any other city, borough, or town incorporate within this realm of England is used and accustomed, or may or ought so to be done: And we will, and for us, our heirs and successors, do ordain, that the serjeants-at-mace for the city aforesaid for the time being, or any of them, all juries *panels, inquisitions, attachments, precepts, mandates and warrants, judgments, processes, and other things whatsoever necessary to be done touching or concerning the causes aforesaid,

*9]

*10]

or any other causes whatsoever, of the city aforesaid, within the said city and the liberties of the same, shall do and execute as to them shall be commanded, according as the law requires, or according to the custom of the city aforesaid, and as in the like cases is used or ought to be done in any other court of record in any other city, borough, or town incorporate within the kingdom of England; and that the serjeants-at-mace of the city aforesaid for the time being, and every of them, may have power of arresting, taking, attaching, and distraining, by bodies or goods and chattels, or by both of them, whatsoever persons within the city aforesaid, the suburbs, franchises, and liberties thereof, against whom any complaints of any personal pleas in the court aforesaid shall be brought, to answer to the plaintiff in the same complaints: And that the mayor of the city aforesaid, and his successors, shall and may have, to the use of the same mayor, aldermen, and citizens of the city aforesaid for the time being, all and all manner of fines, amerciaments, and other profits of and in the court aforesaid, or by reason or pretence of the same court arising, coming, or happening."

The revising barrister found, that, since the passing of the 5 & 6 W. 4, c. 76, the corporation had appointed a treasurer and other officers.

Persons called "mayor's porters" were appointed by the old corporation under the first part of the foregoing extracts; and such porters took the following oath:—

"First. That you shall well, honestly, and truly behave yourself, and shall observe, occupy, exercise, and keep the office of the portership of the gate within the city of Hereford, by night and by day:

"Item. You shall make true attachment, and true *return and presentments of the same forthwith at the next court following, and nothing conceal from the mayor of the court:" [*11

"Item. That you shall do no extortion to the King's Majesty's people, nor take of them bribes, but take the due fee that belongeth to your office, according to the law and custom of this city, and the laws of this realm:

"Item. You shall well and truly keep the keys of the said gate, save unto the use of the King's Majesty, for the said city, and lock it every night by ten of the clock, and so keep the same gate shut until daylight, except it be upon reasonable causes, at the request of honest persons having business and affairs, to pass and repass, &c.: and also shall keep the keys of the said gate safe to the King's Majesty's Highness's use, and be always ready at the mayor's commandment, and not to deliver the keys to any other. So help you God."

In consequence of the removal of the city gates, the foregoing oath has long since ceased to be administered to the mayor's porters, who, in lieu thereof, took the constable's oath, of which the following is a copy:—

"You shall well and truly occupy and exercise the office of constableship of the peace in this city of Hereford, and the liberties thereof: You shall see His Majesty's peace kept duly and truly at all times to the utmost of your power, so long as you shall continue in the said office: You shall be obedient unto the commandments of the mayor and justices of the peace of the same city at all times, both by night and by day, as well for the preservation of His Majesty's peace as in all other lawful things: All warrants, writs, and precepts to you directed, you shall execute and do: You shall see the statute of Winchester and all other statutes put in execution concerning vagabonds, beggars, and unlawful games: Also you shall see the King's
*12] Majesty's watch kept within this *city, when required, according to the laws and statutes in that case provided: And all other things that belong to your said office you shall well and truly execute and do, to the best of your power, as long as you shall continue in the same. So help you God."

Upon the passing of the Municipal Corporation Reform Act, the mayor's porters then in office, in pursuance of the powers thereby given, received compensation; and one similar officer only was appointed.

On behalf of the objector it was contended that the voter, William Arnold, and the other serjeants-at-mace, were constables appointed under the Municipal Corporation Reform Act, and were disqualified from voting, by the statute 19 & 20 Vict. c. 69, s. 9, and were consequently not entitled to remain upon the register of voters of the said city and borough.

The revising barrister decided that the serjeants-at-mace were appointed by the corporation of Hereford under the said charter, and not under the Municipal Corporation Reform Act; and that the voter, William Arnold, was not disqualified from voting: and he allowed the vote.

If the court should be of opinion that this decision was incorrect, the name of William Arnold was to be removed from the list of freemen entitled to vote in and for the said city.

Francis Woodhouse Hollings and Charles Morgan, mentioned in a schedule annexed to the case, were duly objected to by the same objector, and on the same grounds; and the facts relating to them were the same as already set out, excepting that Francis Woodhouse Hollings was qualified to vote as a householder as well as a freeman; and the same decision was come to in each case.

Notice of appeal was given, and the appeals consolidated.

*13] *W. H. *Cook*, for the appellant.—The decision of the revising barrister is clearly errroneous. The appointment of Arnold to the office of serjeant-at-mace, which took place in 1851, was made by virtue of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, and not under the charter set out in the case. By the 1st section of

that statute, it is enacted that "so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters patent now in force relating to the several boroughs named in the schedules A. and B. to this act annexed (and, amongst others, the city and borough in question), or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act, shall be and the same are hereby repealed." Except, therefore, so far as they are preserved by that act, all the powers of the old corporation are at an end. Previous sections having provided for the election of a body to be called the town-council of the borough, the 58th section proceeds to define their duties with regard to the appointment of corporate officers: it enacts, "that the council of every borough, on the 9th day of November in the then present year, shall appoint a fit person, not being a member of the council, to be the town-clerk of such borough, &c.; and the council of every borough shall in every year appoint another fit person, not being a member of the council, to be the treasurer of the borough, *and also such other officers as have been usually appointed in such borough, or as they shall think necessary for enabling them to carry into execution the various powers and duties vested in them by virtue of this act*, and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be re-appointed; and shall take such security for the due execution of his office by any *such town-clerk, treasurer, or other officer, as the said council shall think proper; [*14 and shall order to be paid to the mayor, and to the town-clerk and treasurer, and to every such other officer to be employed as aforesaid, such salary or allowance as the said council shall think reasonable; and, in case of a vacancy in any such office as aforesaid by death, resignation, or removal, the council of such borough may appoint another fit person in the place of the person so making such vacancy; provided that the town-clerk and treasurer shall not be the same person." That clause provides that the whole future patronage of the borough shall be vested in the town-council. The 65th section provides "that the council elected under this act in any borough shall have power to remove from his office every bailiff, treasurer, or chamberlain, and every other ministerial or executive officer of such borough and body corporate who shall be in office at the time of the first election of councillors under this act; and every such bailiff, treasurer, or chamberlain, *and every other ministerial or executive officer in such borough*, shall continue to act in the same capacity as heretofore, and to execute all the duties heretofore belonging to his office, and be entitled to have the same salaries, fees, and emoluments as he would have had if this act had not passed, until he shall be removed from his office and no longer, *unless he shall be re-appointed according to the provisions of this*

act." The provision for the appointment of constables is contained in s. 76, which enacts "that the council to be elected for any borough shall, immediately after their first election, and so from time to time thereafter as they shall deem expedient, appoint, for such time as they may think proper, a sufficient number of their own body, who, together with the mayor of the borough for the time being, shall be and be called the watch-committee for such borough, &c.; and such
*15] watch-committee shall, within *three weeks after their first formation, and so from time to time thereafter as occasion shall require, appoint a sufficient number of fit men, who shall be sworn in, before some justice of the peace having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace; and the men so sworn shall, not only within such borough, but also within the county in which such borough or part thereof shall be situated, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has or hereafter may have within his constablewick by virtue of the common law of this realm or of any statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within such borough, or within any county in which they shall be called on to act as contables, for conducting themselves in the execution of their office." The watch-committee, therefore, who are delegated by the town-council, appoint all constables. The case finds that the serjeants-at-mace are constables,—that they act "as police constables and conservators of the peace, executing warrants, serving summonses, and apprehending prisoners." Since the passing of the Municipal Corporation Reform Act, they derive their authority solely from their reappointment by the town-council. The 7th section of the 19 & 20 Vict. c. 69, enacts that "the constables acting under the 2 & 3 Vict. c. 93,(*a*) the 3 & 4
*16] Vict. c. 88,(*b*) the 5 & 6 W. 4, c. 76, and this *act, or any of the said acts, shall, in addition to their ordinary duties, perform all such duties connected with the police in their respective counties or boroughs as the justices in general or quarter sessions assembled, or the watch-committees of such respective counties or boroughs, from time to time direct and require." The respondent, therefore, clearly falls within the prohibition contained in the 9th section of the 19 & 20 Vict. c. 69, that "no head or other *constable* already appointed, or hereafter to be appointed for any borough, under the said act of 5 & 6

(*a*) "For the establishment of county and district constables by the authority of justices of the peace."

(*b*) An act to amend the last-mentioned act.

W. 4, c. 76, except special constables, shall, during the time he continues to be such constable, or within six calendar months after he has ceased to be such constable, be capable of giving his vote for the election of any person to any municipal office in such borough, or for the election of a member to serve in parliament for such borough or any county in or to which such borough is situate (either wholly or in part) or adjoins, or for any borough within any such county," &c. The sergeant-at-mace is clearly a constable, and one who can only derive his authority by appointment under the Municipal Corporation Reform Act, and consequently is prohibited from voting.

H. James, for the respondent.—The decision of the revising barrister is right. The respondent and the two other persons named are not "constables" at all; and, if they are constables, they are not "constables appointed for the borough under the 5 & 6 W. 4, c. 76," and therefore not within the 19 & 20 Vict. c. 69, s. 9. The revising barrister has not found by the case that these persons are constables; and there is nothing in the charter, or in the oath, in which their duties are defined, to show that they are appointed for the purpose of acting as constables. It is true, it was part of their duty to assist in keeping the peace; but that is no more than the *duty which the law imposes upon every magistrate, as well as upon a watchman or beadle: [*17 see Lawrence *v.* Hedger, 3 Taunt. 14. The original creation of serjeants-at-mace was with a view to their attendance upon the mayor's court, as well as upon the person of the mayor upon state occasions, and not with a view to the performance by them of the ordinary duties of peace officers or police constables. Should the court, however, think that these serjeants-at-mace are constables, they are not constables appointed under the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76. The argument on the other side assumes that the statute intended to abolish all charters then existing. The 1st section, however, expressly reserves them, except in so far as they may be inconsistent with or contrary to the provisions of that act. It was not intended to operate any new creation of corporations; but merely to alter the terms on which the old corporations were to continue to exist. Upon its being suggested by counsel in Arnold *v.* Ridge, 13 C. B. 745, 750 (E. C. L. R. vol. 76), that "the new corporations are not the same as existed before the 5 & 6 W. 4, c. 76," Maule, J., observed: "They have very often been so considered. I do not think you can successfully contend the contrary." The case is in truth, disposed of by the 76th section, which enables the watch-committee to appoint all constables who are appointed under the act: and the case finds that the serjeants-at-mace are appointed, not by the watch-committee, as they would be if appointed under the act, but by the mayor and corporation, by whom the oath is administered to them,—no change having taken place in the mode of their appointment since the passing of the 5 & 6 W. 4. c. 76. The 77th

section gives the watch-committee power to dismiss constables: could they take upon themselves to dismiss persons who are appointed to the office of serjeants-at-mace by the mayor? Again the 11 & 12 Vict. c. 14, provides for the *superannuation of constables: could these persons be superannuated by the watch-committee? It is submitted that the officers in question are not constables within the 9th section of the 19 & 20 Vict. c. 69, and therefore not deprived of the right of voting.

*18]

Cooke, in reply.—In order to bring him within the operation of the 19 & 20 Vic. c. 69, s. 9, it is not necessary that the party should be a "police" constable. The case finds that these persons are paid by the treasurer of the borough: and all constables who participate in the borough-fund under the 5 & 6 W. 4, c. 76, are deprived of the right of voting. They were constables before the passing of the act; and are so still.

CRESSWELL, J.—I am of opinion that the respondent in this case is entitled to be continued on the register. It appears to me that a serjeant-at-mace cannot be considered as an officer appointed under the 5 & 6 W. 4, c. 76. Upon looking at the 58th section of that act,—which relates to the appointment of officers,—I think it may have been introduced for this purpose:—The legislature having in previous sections provided for the election of a new governing body, to be called the town-council, declare by the 58th section that all such officers as have usually been appointed in the borough, or as may be thought necessary for enabling them to carry into execution the various powers and duties vested in them by the act, shall thereafter be appointed by such new governing body. It was necessary to give that power in terms to the newly-created body, inasmuch as it might otherwise have been contended that the old municipal body continued to exist for that purpose, the charter remaining unrepealed. Therefore, when the act of parliament vests the power of appointment in the new governing body, and does not take away the charter, the *inevitable conclusion, in my judgment, is that those persons are still appointed virtually under the charter, and not under the act of parliament. The next clause of the act relied on is the 76th, which enables the town-council to select certain members of their own body, who, together with the mayor, shall be called the watch-committee, and enacts that such watch-committee shall appoint constables for preserving the peace in the borough. Now, it may very well be doubted whether this person is a constable at all, though his appointment may entail upon him the performance of duties like those performed by constables. The power given to the watch-committee is, a special power to appoint constables "who shall be sworn in before some justice of the peace having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the

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peace." The serjeants-at-mace are neither appointed nor sworn in under that section. The recent act of 19 & 20 Vict. c. 69, in s. 1, recites the 2 & 3 Vict. c. 93, and the 3 & 4 Vict. c. 88,—acts for the establishment and regulation of county and district constables; and then recites, that, by the 5 & 6 W. 4, c. 76, "provision is made for the appointment of constables in all boroughs in England and Wales, which are subject to that act," and that, "for the more effectual prevention and detection of crime, suppression of vagrancy, and maintenance of good order, it is expedient that further provision should be made for securing an efficient police-force throughout England and Wales." Now, the only provision in the 5 & 6 W. 4, c. 76, for the appointment of constables, is that contained in the 76th section: and, when we find provisions in the earlier sections of the 19 & 20 Vict. c. 69, for the appointment and regulation of constables for the more effectual prevention and detection of crime, suppression of vagrancy, and *maintenance of good order, followed by an enactment in s. 9, that "no [*20 head or other constable already appointed or hereafter to be appointed for any borough, under the 5 & 6 W. 4, c. 76, except special constables, shall, during the time he continues to be such constable, or within six calendar months after he has ceased to be such constable, be capable of giving his vote for the election of any person to any municipal office in such borough, or for the election of a member to serve in parliament for such borough," &c., I cannot for a moment doubt that the legislature was intending to refer to the officers appointed under the 76th section of the 5 & 6 W. 4, c. 76, and consequently that the serjeants-at-mace, who are appointed in the manner mentioned in the case, do not fall within the 9th section of the 19 & 20 Vict. c. 69. I therefore think the respondent's name was rightly retained upon the register, and that the appeal must be dismissed.

CROWDER, J.—I also am of opinion that the respondent was entitled to have his name retained upon the register, because I think he does not fall within the 9th section of the 19 & 20 Vict. c. 69, which deprives constables appointed under the 76th section of the Municipal Corporation Reform Act of the right of voting in the election of members for the borough. Those persons only are to be deprived of the franchise who come distinctly and clearly within the first-mentioned provision. It is immaterial to inquire whether, if the duties to be performed by the serjeants-at-mace are the same as those of ordinary constables, and that fact had been brought to the attention of the legislature, they might not have been included in the prohibition contained in the 9th section of the recent act; for, I think it is impossible to say that they are appointed under the 5 & 6 W. 4, c. 76, s. 76. I agree with my brother Cresswell in *thinking that there is nothing in [*21 the 58th section to warrant us in concluding that the serjeants-at-mace are appointed under that section. I was anxious during the

argument to learn if there was any other section of the Municipal Corporation Reform Act referring to the appointment of constables. None could be pointed out but the 76th, which clearly relates only to officers appointed by the watch-committee. When the 9th section of the 19 & 20 Vict. c. 69, is looked at, it evidently refers to such constables as are appointed under the 76th section of the 5 & 6 W. 4, c. 76. The sergeant-at-mace not being a constable appointed under that section, the prohibition does not refer to him, and consequently his right of voting remains.

WILLES, J.—General words in an act of parliament are always to be construed according to the subject-matter with which the legislature is dealing. It is clear from the recitals in the 1st section of the 19 & 20 Vict. c. 69, that the 9th section meant to deal with the descriptions of constables thereinbefore alluded to; and, therefore, when it enacts that *no* constable appointed under the 5 & 6 W. 4, c. 76, shall be entitled to vote, it must be understood to mean no *such* constable as before referred to, viz. constables appointed pursuant to the provisions of the 76th section of the Municipal Corporation Reform Act. An instance of this sort occurs in the 7th section of the 3 & 4 W. 4, c. 98, which enacts "that no bill of exchange or promissory note made payable at or within three months of the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, &c., be void;" and then proceeds, "nor shall the liability of any party to *any bill of exchange* or promissory note be affected by reason of any statute or law in force for the prevention of
*22] usury." The Court of Queen's Bench, in a case of *Vallance *v.* Siddel, 6 Ad. & E. 932 (E. C. L. R. vol. 33), 2 N. & P. 78, seemed to think that the words "*any* bill of exchange," were to be construed as "any *such* bill of exchange."(*a*)

James asked for costs.

CRESSWELL, J., after consulting the master, said he understood the practice to be, to allow the respondent his costs of the appeal, when the decision of the revising barrister is affirmed.(*b*)

WILLES, J.—Especially where, as here, the party's claim to the franchise is established by our decision.

Cooke, for the appellant, submitted that it could hardly be considered a case for costs, seeing that the question was one that was fairly arguable.

CRESSWELL, J.—I must confess I thought it a very plain case on reading it.

Appeal dismissed, with costs.

(*a*) And see King *v.* Braddon, 10 Ad. & E. 675 (E. C. L. R. vol. 37), 2 P. & D. 546.
(*b*) See 17 C. B. 315, n. (*a*) (E. C. L. R. vol. 84); and post, pp. 23, 33, 62.

*Borough of BURY ST EDMUNDS. [*23

JAMES WILLIAM CLARK, Appellant, The Overseers of the Parish of ST. MARY, BURY ST. EDMUNDS, Respondents. *Nov.* 10.

A. claimed to be registered as the occupier of a house of the requisite yearly value to confer a vote. The revising barrister found that A. was the keeper of the Guildhall at B.; that the house in question was the residence assigned by the corporation to the hall-keeper, and in which he was *required* to reside; and that it was necessary for the due performance of his duties as hall-keeper that he should reside there:—Held, that this was an occupation as *servant* to the corporation, and not an occupation as *tenant* within the 2 W. 4, c. 45, s. 27.

Where the decision upon an appeal is adverse to the claim of franchise, *semble* that the court will grant or withhold costs according as they see that there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, costs will be given as a matter of course.

AT a court held for the revision of the lists of voters for the borough of Bury St. Edmunds, James William Clark claimed to be inserted in the said list for the parish of St. Mary, in the said borough, as follows:—

Name &c. of voter.	Place of abode.	Qualification.	Street, lane, &c., where property situate, &c.
Clark, James William.	80, Whiting Street.	House.	80, Whiting Street.

Within the said borough are certain charity trust estates formerly called The Guildhall Feoffment, belonging to certain trustees or feoffees, and now regulated by a scheme made by the Court of Chancery in 1842. Amongst the said estates are the Guildhall and the house in Whiting Street occupied by the said James William Clark. The Guildhall is used for general public purposes connected with the borough, and is not rated to the relief of the poor. The said Guildhall is situate in Guildhall Street, which street runs parallel to Whiting Street, in which is the house occupied by the said James William Clark (of the yearly value of 10*l.* and upwards). At the back of the house in Whiting Street is a garden, having a door communicating with a yard at the back of the Guildhall. The said door in the said wall is fastened by a lock and a bolt on the side towards the said garden, and is the only means of communication between the *Guildhall premises and the house and garden. The said James William Clark [*24 has the keys, and the entire and exclusive control of the said house; the feoffees reserving a small room as an office under the same roof, but having no internal communication with the said house, and entered by a door opening into a yard at the side of the said house, also occupied by the said James William Clark. The entrance door of the Guildhall, opening into Guildhall Street, is secured by a lock, which can be used from the inside and from the outside, and by an iron movable bar inside, occasionally used.

The hall-keeper is elected annually, in January, by the said feoffees. The said James William Clark was elected hall-keeper in January, 1846, and has since been elected annually up to and inclusive of the present year.

According to the entry contained in the minute book of the resolutions come to by the said feoffees at their annual meeting held in January of each year, pursuant to the scheme, and dated the 15th of January, 1846, the said James William Clark was elected hall-keeper, to have possession at Lady-Day then next, and to receive salary from the date of election.

From January, 1847, to January, 1853, inclusive, the said James William Clark was re-elected under the following minute annually entered in the said book:—"Mr. James William Clark was elected hall-keeper for the year ensuing." On the 12th of January, 1854, the minute is as follows:—"Mr. James William Clark is elected hall-keeper for the year ensuing; *and that the said James William Clark be continued as tenant of the house in which he lives, he paying the rates, taxes, and outgoings.*" On January the 11th, 1855, a minute similarly worded with the preceding one appears in the same book. On January the 10th, 1856, the entry is,—"Mr. James William Clark is elected hall-keeper for the ensuing year."

*25] *From the appointment of the said James William Clark, in January, 1846, until the 6th of April in the same year, the said James William Clark resided in and occupied another house, paying rent, rates, and taxes for the same, the widow of the late hall-keeper being permitted during that period to remain in the house in question.

The said James William Clark pays no money rent for the said house; his occupation being considered as part payment for his services.

It is necessary for the due discharge of his duties as hall-keeper that he should reside in the house in question, which was built, upwards of forty years ago, *for the residence of the hall-keeper.*

The said James William Clark, since his appointment in January, 1846, and up to the present time, has paid all rates and taxes, and done all internal repairs, excepting on one occasion, when the feoffees and himself jointly re-floored one of the rooms in the said house.

A minute of the 9th of February, 1846, in the aforesaid minute-book, is as follows:—"The hall-keeper, James William Clark, applied to the trustees for directions whether he was to pay for the fruit-trees at the hall-keeper's house; and, it appearing to the trustees that such trees could not be removed by Mrs. Ward, they were not to be paid for by Clark; and Clark was informed that he would not be paid for anything which he should leave."

Being of opinion that *the occupation of the said house by the said James William Clark was necessary to the due performance of his duties*

as hall-keeper, and that he was *required* to occupy the said house, the revising barrister disallowed the claim of the said James William Clark.

Welsby, for the appellant.—The question is whether the claimant, James William Clark, occupied the house *described in the case, [*26
as tenant, within the 2 W. 4, c. 45, s. 27. It is to be observed that the revising barrister has not found as *a fact* that Clark was *required* to occupy it, as part of the terms of his employment as hall-keeper, but merely states that as his opinion, or as an inference from the facts which he has found. All the law that is to be found on this subject is contained in the judgment pronounced by this court in Hughes, App., The Overseers of Chatham, Resp., 7 Scott, N. R., 581, 5 M. & G. 54 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 51, and Dobson, App., Jones, Resp., 8 Scott, N. R. 80, 5 M. & G. 112, 1 Lutw. Reg. Cas. 105. In the former of these cases, A., the master rope-maker in a royal dock-yard, had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes: the house was stated in the case to belong to the lords of the Admiralty: if A. had not had it, he would have had an allowance for a house in addition to his salary: and it was held that A. occupied the house as tenant within s. 27. In the other case, of Dobson, App., Jones, Resp., A., the surgeon of Greenwich Hospital, as such, occupied a house at the infirmary in the hospital, which was appropriated to the surgeon: repairs were done by the commissioners of the hospital: the surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging-money: and, by the regulations of the commissioners of the hospital, no officer of the hospital is allowed to make any exchange of apartments. It was held that A. did *not* occupy the house *as tenant* within s. 27, inasmuch as he was *required* to occupy the same with a view to the more efficient performance of his duties as a surgeon. The present case has some of the incidents which appear in both these cases, and some additional ones. The principle which must govern this case is very clearly laid *down by Tindal, C. J., in the case first cited. "There is," he [*27
says, "no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and, if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them: it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy, in the performance of his contract to serve his master. The settlement cases

cited in argument established, and proceeded on, this distinction. We think it applicable to the present question; and, as there is nothing in the facts stated to show that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order to* their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong. The case, indeed, states that the claimant was master rope-maker, and *as such* had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them. The fact also of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may
*28] well happen *that something *in the service* which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants. But, in the present case, upon the grounds above stated, we think the juster inference is, that there is an occupation as tenant." Applying those principles to the present case, it appears that Clark has the entire and exclusive possession and control of the house. By the entries in the minute-book of the feoffees, which form part of the case, it appears that Clark came in with certain rights as a succeeding tenant, after the death of his predecessor in the office of hall-keeper; that he pays all rates, taxes, and outgoings; and that he has always been recognised and dealt with by the feoffees as their tenant,—the occupation of the house being considered as part payment for his services. It is true the revising barrister finds as a fact that "it is necessary for the due discharge of his duties as hall-keeper that Clark should reside in the house in question:" but it is not found that another house equally near to the Guildhall would not be as convenient and efficient for that purpose. The decision in Dobson, App., Jones, Resp., proceeded upon the ground that there the appellant was *required* to occupy the house in respect of which he claimed to be on the register. After adverting to the principle upon which the former judgment proceeded, Tindal, C. J., says,—"In deciding the present appeal, we have only to consider within which of the two classes the present case ranges itself. It is found by the case that the appellant is the surgeon of Greenwich Hospital; that the house which he occupies is in the infirmary; and that he occupies it as such surgeon. Now, the nature

of the office of surgeon of the hospital is such that a residence in some *known and certain dwelling may reasonably be required for the due performance of his office. But it is further found that he [*29 was placed in it when he was first appointed (nineteen years ago), and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And, lastly, it is found by the revising barrister, that, by the regulations established by the lords commissioners of the Admiralty, the officers of the hospital having apartments, are to inhabit those assigned to them, and that no exchanges, or other appropriations, are to be made, without permission. The revising barrister, upon this state of evidence before him, appears to have come to the conclusion that the appellant does not occupy this house simply *by permission* of the government, and as part of the remuneration for his services as surgeon, but that he is *required* to occupy this house, with a view to the more efficient performance of the duties of his office; and, consequently, that there was no occupation by him in the legal relation of tenant to a landlord. And, upon the state of facts so brought before the revising barrister, and set out upon the case, we cannot say he has come to a wrong conclusion in point of law."

Byles, Serjt., for the respondents.—The revising barrister in this case has come to a right conclusion. In order to confer a right of voting, as tenant, under the 2 W. 4, c. 45, s. 27, it is not enough that the party shall merely *occupy* a house of the requisite value,—so as to become liable to be rated, or so as to "come to settle" within the 13 & 14 Car. 2, c. 12,—but he must occupy *as tenant:* he must be an independent occupier. It is conceded that the true construction of the clause in question is to be gathered from the judgments of this court in the two cases referred to. The real question is this,—Is the party *required* to occupy the house as subservient to his appointment? If so, he does not occupy *as tenant*, whether he pays rates or not. If, on the other hand, he has the liberty of residing there or [*30 elsewhere at his option, and is only *permitted* to occupy the house, though it be more convenient to the due performance of his duty or service, and though he pays no money rent for it, he occupies as tenant, and is entitled to be registered as such. The facts stated in this case clearly show that Mr. Clark stands in the former predicament. The Guildhall and the house in question stand upon the same piece of ground. There is a door of separation, which is fastened on the side of the dwelling-house; the only mode of securely fastening the front door of the Guildhall being within. The house was built for the residence of the hall-keeper; and it is necessary for the due discharge of the hall-keeper's duties that he should reside therein. The revising barrister has distinctly found,—and his opinion on the fact is communicated to the court,—that it was *necessary* and that the claimant was

required to occupy the house. [CRESSWELL, J.—He states that as his opinion, but he does not in terms find it as a fact.] It is at all events distinctly found as a fact that it was necessary for the discharge of the hall-keeper's duties that he should reside in the house provided by the corporation for that purpose. In other words, the duties of his office could not be efficiently performed unless he resided there. [WILLIAMS, J.—A jury might presume that he was required to reside there, the nature of his duties making it necessary that he should do so.] If it appears that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order* to their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services,—as Tindal, C. J., says in Hughes, App., The Overseers of Chatham, Resp., with his usual perspicuity, clearness, and simplicity,—that is enough to support the finding of the revising barrister in this case, *31] *that the occupation by Clark was an occupation as servant, and not as tenant. In Dobson, App., Jones, Resp., the surgeon was held not to acquire a right of voting, because his residence in the house allotted to him was not voluntary, but obligatory on him. The facts clearly bring this case within the principle which was held in those two cases to disentitle the party to the franchise.

Welsby, in reply.—The facts found by the revising barrister are not, it is submitted, sufficient to deprive this claimant of the character of tenant. That must depend upon the bargain between him and his employers,—does the contract under which he was appointed *require* him to occupy this house, as the regulations established by the lords commissioners of the Admiralty did in Dobson, App., Jones, Resp.? The fact that his residence there is *convenient* is not sufficient to outweigh all the other circumstances stated in the case. And it must not be forgotten that the burthen of showing that the franchise is taken away rests upon the respondents.

CRESSWELL, J.—I do not find in the two cases of Hughes, App., The Overseers of Chatham, Resp., and Dobson, App., Jones, Resp., any distinct principle laid down for the determination of these cases; but they lay down some rules by which we may to a certain extent be guided. I apprehend the true question to be whether the claimant occupied the premises as tenant or as servant. It may be that the party occupies as tenant, and that he is required to occupy; but it may also be that he occupies as servant, and that he is required to occupy because he is a servant. It seems to me that the revising barrister has in effect found here that the claimant was required to occupy and did occupy as servant; and that there is *32] abundant *reason for holding that he did occupy in the character of servant, and not in that of tenant. The case finds that "it is necessary for the discharge of his duties as hall-keeper that he should

reside in the house in question, which was built for the residence of the hall-keeper." And it appears to be a place where convenience requires that he should reside, in order that he might have by the internal communication with the Guildhall premises the means of securely fastening them at night. I therefore think we are justified in holding that the claimant occupied these premises as servant, and not as tenant within the 27th section of the Reform Act, 2 W. 4, c. 45.

CROWDER, J.—I also am of opinion that the revising barrister came to a right conclusion in this case. The question he had to decide was, whether this person occupied the premises described in the character of tenant, or merely as a servant. All the facts set out in the case seem to me to show that his occupation was in the character of servant. The house was built for the residence of the hall-keeper, and it was a place where it was not only convenient but necessary that he as the servant of the corporation should reside. From the very nature of his appointment, as stated in the case, it must have been so; and I think the revising barrister has sufficiently found it, for, he states it to be his opinion that the occupation of the said house by the claimant was necessary to the due peformance of his duty as hall-keeper, and that he was *required* to occupy it. I feel irresistibly led to the conclusion that Clark's occupation of the premises was an occupation as servant, and not as tenant, and therefore that the revising barrister very properly rejected his claim.

WILLES, J.—I am of the same opinion. I think the proper conclusion from the facts stated, is, that it was *part of the terms of the hall-keeper's employment that he should reside in the house [*83 in question, and that his occupation was not in the character of tenant.

Byles, Serjt., asked for costs.

CRESSWELL, J.—I understand the general rule to be, to give the respondent costs where the appeal is dismissed, unless it be a case of reasonable doubt.

WILLES, J.—The rule suggested last year, was, that, where the court decides adversely to the claim to the franchise, they will consider whether there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, the costs will be allowed.

CRESSWELL, J.—We think this is not a case for costs.

Appeal dismissed, without costs.(a)

(a) See 17 C. B. 315 (a) (E. C. L. R. vol. 84); antè, p. 22; post, p. 62.

*34] *County of DURHAM,—Northern Division.

JOHN STEPHENSON ROBSON, Appellant, LAWRENCE LAWSON BROWN, Respondent. *Nov.* 14.

Appeals cannot be consolidated under the 6 & 7 Vict. c. 18, s. 44, unless they depend upon the same precise point of law.

Where, therefore, a consolidated appeal contained a different statement of facts as applicable to the several voters, requiring several decisions in point of law, the court declined to entertain it.

AT a court held for the revision of the lists of voters for the northern division of the county of Durham, on the 16th of September, 1856, at Lanchester, John Stephenson Robson, on the register of voters for the said division, duly objected to the name of Lawrence Lawson Brown being retained on the register of voters for the parish of Hunstonworth in the said division.

The name of the said Lawrence Lawson Brown appeared on the said register, as follows:—

Name, &c., of voter.	Place of abode.	Qualification.	Local description of the property, &c.
Brown, Lawrence Lawson.	Witton-le-Wear.	Annuity out of freehold lands.	Lord Crewe's trustees.

N.B. In the heading of the fourth column, for the local description of the property, is inserted the following direction, viz. "or, if the qualification consist of a rent-charge, then *the names of the owners* of the property out of which such rent is issuing, or some of them, and the situation of the property."

The said John Stephenson Robson also objected to the several names of John Calcot, Mark Pattinson, and James Thompson, whose qualifications were respectively described on the said register, in the third column, as "freehold rent-charge," and in the fourth column as "Lord Crewe's trustees;" also to the name of George Dugard, whose qualification was described on the said register, in the third column, as "freehold rent-charge," and in the fourth column as "Hunstonworth, *35] Lord *Crewe's trustees, owners;" also to the name of William Cassidi, whose qualification was described on the said register, in the third column, as "annual charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" also to the name of William Darnell, whose qualification was described on the said register, in the third column, as "rent-charge issuing out of freehold lands," and in the fourth column as "Lord Crewe's trustees;" also to the name of William Kay, whose qualification on the said register was described, in the third column, as "annual charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" also to the name of Richard Marshall, whose qualification on the said register was de-

scribed, in the third column, as "annual charge on freehold lands," and in the fourth column as "in the parish of Hunstonworth;" also to the name of Robert Taylor, whose qualification on the said register was described, in the third column, as "annual rent-charge on freehold lands," and in the fourth column as "Lord Crewe's trustees;" and also to the name of Henry Baker Tristram, whose qualification on the said register was described, in the third column, as "freehold rent-charge," and in the fourth column as, "out of lands in the parish of Hunstonworth, Lord Crewe's trustees, owners."

The facts of the case, as proved, were as follows:—

Lord Crewe, being seised in fee of certain lands, tenements, and hereditaments in the said parish of Hunstonworth, in the said county of Durham, and also of other lands, tenements, and hereditaments in the county of Northumberland, by his will, dated the 24th of June, 1720, and properly executed (and attested) to pass real estates, devised all the said lands, tenements, and hereditaments, to five trustees named in the said will, their heirs and assigns, for ever, upon the following trusts, viz. upon trust that they, the said trustees, and the survivors and survivor of them, and the heirs and assigns of the *survivor of them, should, out of the rents, issues, and profits of the said [*36 lands, tenements and hereditaments, in the said counties of Durham and Northumberland, for ever thereafter pay or cause to be paid the yearly sum of 20*l.* to each and every of twelve exhibitioners of Lincoln College, in the University of Oxford, which he had then already named and appointed, or which he should thereafter nominate and appoint, and to each and every of twelve exhibitioners to be elected and chosen after his decease, as thereinafter mentioned, who should be under-graduate commoners in Lincoln College aforesaid, and who were or should be natives of the diocese of Durham, and, for want of such, natives of Northallertonshire, Howdenshire, in the county of York, or of Leicestershire, and particularly of the parish of Newbold Verden, or of the diocese of Oxford, whereof he was formerly bishop, or of the county of Northampton, in which county he was born (with certain directions and limitations for electing fresh exhibitioners in case of vacancies, and as to the time and conditions of the holdings of the said exhibitions, not material in the judgment of the revising barrister to the present cases): Upon the further trust that the said trustees, their heirs and assigns, should, out of the rents, issues, and profits of the said lands, tenements, and hereditaments in the said counties of Durham and Northumberland devised to them as aforesaid, for ever thereafter, pay the annual sums thereinafter mentioned, that is to say, unto the minister of the parish church of Bamboro, in the county of Northumberland, and his successors, the yearly sum of 40*l.* per annum; and to the minister of St. Andrew's church in Auckland, in the county of Durham, and his successors, the yearly sum of 30*l.*; and the yearly sum of 10*l.*

apiece for the augmentation of twelve poor rectories, vicarages, small livings, or curacies in the diocese of Durham, such as he should by any
*37] writing or writings, codicil or codicils, under his hand and seal, to *be attested by three or more credible witnesses, from time to time direct and appoint, and, in default thereof, to and for the augmentation of twelve such poor rectories, vicarges, small livings, or curacies within the diocese of Durham aforesaid, as the said trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should direct and appoint; and unto the ministers, lecturers, or curates of the parishes of All Saints and Saint Michael's in Oxford, of Twyford, in the county of Bucks, and of Comb, in the county of Oxford, which belonged to Lincoln College aforesaid, and to the several successors for the time being, the several yearly sums of 10*l.* apiece for catechising youth, within the same respective parishes; and unto the poor scholars of Trap and Marshall in Lincoln College aforesaid (being eight in number), such annual sums as would make up and increase their respective scholarships to the yearly sum of 10*l.* apiece (including what they then already respectively received on account of their several scholarships), to the intent that their respective scholarships might be all alike in their respective yearly values; and to the bible-clerk of Lincoln College aforesaid, such annual sum as would make up and increase his salary to the yearly sum of 10*l.* (including what he then already received on account of his clerkship); and also the yearly sum of 20*l.* to the rector of the said college, and the yearly sum of 10*l.* apiece to each of the said fellows of the said college, which benefactions he gave to the said rector and fellows of Lincoln College aforesaid, and to the college aforesaid, being the place where he had had his education, and of which college he was first fellow and afterwards rector; and to each of the almsmen and almswomen in each of the hospitals of Durham and Bishop Auckland, of the foundation of Bishop Cosens, and to each of the six almswomen in the hospital of Brackley, in the county of Northampton, of the foundation of his grand-
*38] father, Sir *Thomas Crewe, and to each of the two almswomen in the Hospital at Hinton, in the said county of Northampton, of the foundation of Elisha Hele, Esq., the several yearly sums of 40*s.* apiece; and to such schoolmaster of Newbold Verdon aforesaid for the time being, the yearly sum of 20*l.*; and to the trustees for the time being of the hundred of Spackenhoe, in the county of Leicester, for the relief of the widows, orphans, and children of poor clergymen deceased and to their successors, the yearly sum of 10*l.*, to be by the said trustees and their successors distributed for the relief of widows, orphans, and children of poor clergymen, deceased within the said hundred, in such proportions as the said trustees and their successors should think fit; and unto the minister and churchwardens of the parish of Daventry, in the county of Northampton, and to their successors, the yearly sum of

6*l.* to be by them paid and applied for and towards the support and maintenance of a charity school to teach poor children of the said parish of Daventry to read English and write: All which said annual payments he willed and desired should be for ever thereafter paid in manner following, that is to say,—unto the said almsmen and almswomen, by quarterly equal payments, on the Feast of St. Michael the Archangel, St. Thomas the Apostle, the Annunciation of the Blessed Virgin Mary, and St. John the Baptist, the first payment to begin and be made at such of the said feasts which should first or next happen after his decease; and all other the annual payments, by half-yearly equal payments, at the feast of St. Michael the Archangel, and Annunciation of the Blessed Virgin Mary, the first payment thereof to begin and be made at such of the same two last-mentioned feasts which should first and next happen after his decease. And the testator by his said will, did will, order and direct that all the said annual payments by him directed to be paid to the said rector, fellows, exhibitioners, poor scholars of *Lincoln College aforesaid, and to the said ministers, lecturers, or curates, [*39 of All Saints, St. Michael's, Twyford, and Comb, aforesaid, and to the bible-clerk, should be from time to time received by the bursar of the said college for the time being, as other rents of the said college were by him received, to be by him paid for the uses aforesaid, and for no other use or uses whatsoever, whom the testator thereby required to give security to pay the money coming to his hands by virtue of that his will, to the uses aforesaid, to the satisfaction of the rector and fellows of the college aforesaid: and his will was, and he did thereby direct, that all the said annual payments for ever thereafter should be made without any deduction or abatement whatsoever for taxes, charges, or assessments for or by reason of any act or acts of parliament then already made or thereafter to be made, or by reason or means of any other payments, matter, or thing whatsoever, and to begin to be made in manner as he had thereinbefore directed.

Then follow directions as to the application of the surplus rents "after the said annual payments should be paid, and not before," which the revising barrister did not think material to be set forth.

The will contained a clause for the election and appointment of new trustees from time to time on the death of any one or more of the trustees appointed by the will, so as the trustees should never exceed five in number, and providing that the rector of Lincoln College for the time being should be one of the trustees; and the will contained a further clause directing that the trustees for the time being should be satisfied and paid for their charges and expenses which they or any of them should be put unto, lay out, or expend in or about the execution of all, every, or any of the trusts aforesaid, or by reason of any matter or thing whatsoever any ways relating to or concerning that his will, or the trusts therein contained.

*40] *The present trustees are, James Thompson, D.D., rector of Lincoln College, Charles Sharpe, D.D., Archdeacon of Durham, William Nicholas Darnell, D.D., rector of Stanhope, the Rev. Henry George Liddell, rector of Easington, and the Rev. John Dixon, clerk, of Belford.

Hunstonworth is a parish, and the parish and township are co-extensive. Lincoln College is a corporation aggregate, styled "The Warden or Rector and Scholars of the Blessed Mary and All Saints, Lincoln, commonly called Lincoln College;" and the rector and fellows are respectively members of the corporate body.

The said James Thompson is rector, and the said Calcot, Mark Pattinson, and William Kay are severally fellows of Lincoln College.

The said Lawrence Lawson Brown is perpetual curate of Witton-le-Wear, in the county and diocese of Durham, which is one of the small livings or curacies which have been augmented with 10*l.* a year pursuant to the said will of Lord Crewe.

The said William Cassidi is vicar of Grindon, in the county and diocese of Durham, which is another of the small livings which has been augmented with 10*l.* a year pursuant to the said will.

The said William Darnell is perpetual curate of Bamborough, in the said will mentioned.

The said George Dugard is perpetual curate of Barnard Castle, in the county and diocese of Durham, which is another of the small livings which has been augmented with 10*l.* a year, pursuant to the said will.

The said Richard Marshall is perpetual curate of Wettonstall, in the county and diocese of Durham, which is another of the small livings or curacies which has been augmented with 10*l.* a year, pursuant to the said will.

The said Robert Taylor is perpetual curate of Hartlepool, in the *41] county and diocese of Durham, which is *another of the small livings or curacies which has been augmented with 10*l.* a year, pursuant to the said will.

The said Henry Baker Tristram is vicar of Castle Eden, in the county and diocese of Durham, which is another of the small livings which has been augmented with 10*l.* a year, pursuant to the said will.

The aggregate amount of the said several annual sums so by the said will primarily made payable out of the rents, issues, and profits of the said devised lands, tenements, and hereditaments in Durham and Northumberland, is 740*l.* 6*s.* 8*d.*; and they are, and always have been, paid out of a joint fund derived from the rents, issues, and profits of the whole of the said devised lands, tenements, and hereditaments in Durham and Northumberland, without distinction.

All the annual payments directed by the said will to be paid to the rector, fellows, exhibitioners, poor scholars of Lincoln College aforesaid,

and to the ministers, lecturers, or curates of All Saints, St. Michael's, Twyford, and Comb aforesaid, and to the bible-clerk, are and have always been paid by the said trustees to, and received by, the bursar of Lincoln College for the time being, to be by him paid to and for the uses aforesaid, pursuant to the direction of the said will; and the amount so received by the bursar is not carried to the corporate funds of the college, but is by him distributed amongst and paid to the individuals entitled to receive the same, as directed by the said will. The rest of the said annual sums are paid by the trustees directly to the several parties entitled to receive the same pursuant to the directions of the said will.

The gross annual rental of the said devised estates in Hunstonworth amounts to 800*l.* a year and upwards. The ordinary management of those estates, including the collection of rents, costs the trustees from 25*l.* to 30*l.* a year; and the repairs incident to the same estates have *on an average, for the last twenty years, cost the trustees from 40*l.* to 50*l.* a year. [*42

The amount of the net annual rental of the Hunstonworth estates is less than the said aggregate amount of the said annual sums charged on those estates and the said estates in Northumberland by the said will aforesaid.

Of the said devised estates in Northumberland, parts are situate in the northern division of the county, and the rest in the southern division thereof. The amount of the gross rental of those parts which are situate in the northern division of Northumberland, is 6500*l.* a year, and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property amount to 1500*l.* a year. The gross rental of those parts which are situate in the southern division of Northumberland amounts to 1500*l.* a year and upwards, and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property amounts to 400*l.* a year.

It was objected, on the part of the said John Stephenson Robson, that, in all the said cases, the description of the *qualifications* as described on the register was defective, inasmuch as the *local situation of the lands* out of which the rent-charges issued was not correctly stated.

The revising barrister thereupon, in the several cases of Lawrence Lawson Brown, John Calcot, William Cassidi, William Darnell, William Kay, Mark Pattinson, Robert Taylor, and James Thompson, added, in the fourth column, "Hunstonworth," as being the local situation of those lands; and in the case of Richard Marshall, he added, in the fourth column, "Lord Crewe's trustees," as the owners of the property out of which the annual charge issued,—conceiving and determining (?) that he had power so to do under the 40th section

of the 6 & 7 Vict. c. 18, for the better identification of the qualifications; the matters so omitted and insufficiently described having
*43] *being previously supplied to his satisfaction: and, with that amendment, *he held the description of the qualifications as described on the register sufficient, against the objection* (still persisted in on the part of the said John Stephenson Robson), *that, notwithstanding his said amendments, the description of the qualifications, as described in the register, was defective.*

It was also objected, on the part of the said John Stephenson Robson, that none of the said several parties objected to had any sufficient estate in Hunstonworth to entitle them to have their names on the register of votes for the said parish of Hunstonworth; and that their qualifications, as described on the register, were not supported, inasmuch as the annuities were payable out of the lands in the county of Northumberland as well as out of the lands in Hunstonworth, in the county of Durham.

The following objection was also made on the part of the said John Stephenson Robson, in the following language, viz. "that if the said annuities ought to be rateably and proportionably distributed over each division in each county, in proportion to the whole property in each division, and if such rateable and proportionable apportionment of the said annuities were made, then and in that case the said Lawrence Lawson Brown, John Calcot, William Cassidi, William Darnell, George Dugard, William Kay, Richard Marshall, Mark Pattinson, Robert Taylor, James Thompson, and Henry Baker Tristram, would have less than 10*l.* a year out of the said rents arising in the parish of Hunstonworth, and consequently that their qualifications would be insufficient.

It was also further objected, on the part of the said John Stephenson Robson, that the interest of the annuitants was merely equitable; and that they could not elect to take their annuities out of the rents of the lands in Hunstonworth.

*44] *And, lastly, that the said John Calcot, William Kay, Mark Pattinson, and James Thompson, being members of the corporation aggregate of Lincoln College aforesaid, had not individually such an estate or interest in their said annuities as to be a qualification to be on the said register of voters.

The revising barrister overruled these several objections of the said John Stephenson Robson, and retained on the said list the names of the several persons so by him objected to.

Robson having given notice of appeal in each of the above cases, the revising barrister stated this case for the opinion of this court,—adding, that, "it appearing to him that each of the said appeals *depended on the same points of law*, he declared that all the said appeals ought to be consolidated," and named Brown respondent.

Hindmarch, for the appellant.—Notwithstanding the amendments,

the qualifications of the several voters are still inaccurately described. The act expressly requires the form given in the schedule A. No. 3, to be adhered to. Where the qualification consists of a rent-charge, the names of the owners of the property out of which such rent-charge is issuing, or some of them, and the situation of the property, *must* be inserted in the fourth column. It is essential that the person who objects to the vote should have full means of inquiring into the sufficiency of the qualification.

Then, it is submitted that the voters had not a "freehold interest," within the statutes 8 H. 6, c. 7, and 10 H. 6, c. 2, so as to entitle them to be upon the register. The will of Lord Crewe merely contains a direction to the trustees to pay the several sums mentioned out of the profits of the lands devised to the trustees. There is no power of entry or distress to compel payment, but a bare naked trust. It is in truth an interest in *money, and not in land: see Bligh *v.* Brent, 2 Y. & C. 268;† Bradley *v.* Holdsworth, 3 M. & W. 422.† Then, [*45 as to the amount,—if this is a rent-charge, it must issue out of the whole and every part of the lands upon which it is charged. Now, the case finds that the annual value of the lands in Hunstonworth is 800*l.* only; whereas, the yearly value of the lands in the northern division of Northumberland is 6500*l.*, and that of the lands in the southern division 1500*l.* The value of the lands in Durham, in proportion to that of those in Northumberland, therefore, is only as one in ten. Consequently, the claimants cannot in any sense be said to have an interest of 40*s.* a year arising out of lands in Durham,—assuming them to be within the exception in the 2 W. 4, c. 45, s. 18.(*a*) Co. Litt. 147 b. With respect to the master of Lincoln College, the rent-charge (assuming it to be *properly a rent-charge) does not come [*46 to him "by devise,"—which means, a devise to the person himself, whereas, this is a devise to the corporation; nor does he take "by promotion to any benefice or to any office," within the meaning of the act. In the Cambridge Case, 1 Journ. 798, May 28, 1624, cited, Rogers on Elections, 7th edit. 149, the House resolved "that members of colleges, halls, or corporations, not having freehold, saving in right of their

(*a*) Which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage-settlement, *devise, or promotion to any benefice or office*, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same, any statute or usage to the contrary notwithstanding. Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained."

colleges, halls, or corporations, ought not to have votes in elections of knights or burgesses." [Cresswell, J.—There, the land belonged to the body corporate: the division of the profits was mere matter of internal arrangement.] Here, the money is directed to be paid to the bursar of the college. [Cresswell, J.—That may be simply the appointment of an agent for the purpose of distributing and dividing the fund.] The subsequent words "and to the college aforesaid," clearly make it amount to a gift to the rector and fellows in their corporate character. This objection applies to all except the ministers of Bamborough, and St. Andrews, Auckland, to whom respectively are given the several annual sums of 40*l.* and 30*l.* [Cresswell, J.—You may, perhaps, say that the claimants have no right to apportion, and so they have no charge on lands in Durham. Can the party say "I will have so much out of the lands in Durham, and so much out of the lands in Northumberland?"] The right to apportion clearly does not exist. [Crowder, J.—If the parties may apportion, they may claim the right of voting in both counties.] He was proceeding with his argument, when he was stopped by

Cresswell, J., who said.—My attention has been called to a case of Prior, App., Waring, Resp., 5 C. B. 56 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 45, which seems to show that we have no jurisdiction to hear *47] this appeal, inasmuch as the *validity of the several claims or objections does not depend, and has not been decided by the revising barrister, "upon the same point or points of law." The objection having been taken, and the 44th section of the 6 & 7 Vict. c. 18 referred to, it was suggested by the counsel for the appellant that the court might remit the case to the revising barrister, under s. 65, in order that it might be stated more correctly. But Maule, J., said,—"I do not think this can be said to be an insufficiently stated case within that section. There may be very good reason why a man having a bad case may be anxious to consolidate it with a better one." Upon its being urged that both parties were consenting to the consolidation before the revising barrister, the same learned judge observed,—"Two parties may consent to state a case for the opinion of the Court of Chancery; but that would not give the court jurisdiction." And, in giving judgment, the whole court agree, that, in entertaining a case so stated, they would be usurping a jurisdiction which the legislature had not thought fit to confer upon them. It seems to me to be impossible to distinguish that case from the present. The rights of the voters here depend upon totally separate and distinct states of facts.

Hindmarch.—All the cases here depend upon one particular state of facts. The same questions arise in each case,—is this a rent-charge? and, are the claimants possessed of a freehold interest of sufficient amount? All the parties claim under the same will.

CRESSWELL, J.—It may be that one of the claimants might be found to have an interest in land, and, as to others, that the gift is to the corporate body. The circumstances affecting each claimant are different. Each case depends upon a different state of facts, as in Prior, *App., Waring, Resp. I think we are bound by that decision, and must decline to hear this case. [*48

Hindmarch.—The principal question,—and that upon which each case must depend,—is, whether the parties have a freehold interest in land, of the yearly value of 40*s*. It would be scarcely possible to find cases so exactly alike in their circumstances as to present no point of difference.

CROWDER, J.—In Barclay, App., Parrott, Resp., post, p. 49, no less than sixty-two votes depended upon the decision in the principal case, —the whole being alike in point of fact, and all involving the same single question of law.

Montague Smith (with whom was *Manisty*), for the respondent, was not called upon.

CRESSWELL, J.—We are bound by the case referred to. This appeal must be dismissed.

The rest of the court concurring,

Appeal dismissed.

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*Borough of MACCLESFIELD. [*49

JOSEPH BARCLAY, Appellant, THOMAS PARROTT, Town Clerk of MACCLESFIELD, Respondent. *Nov.* 14.

A notice of objection to a *borough vote*, sent by post in the manner prescribed by the 6 & 7 Vict. c. 18, s. 100, need not *on the face of it* show the voter's place of abode.

AT a court held for revising the lists of voters for the borough of Macclesfield, on the 30th of September, 1856, Joseph Barclay objected to the name of Matthew Lea Burgess being retained on the lists of voters for the township of Macclesfield in the said borough.

The stamped duplicate notice of objection was as follows:—

"Notice of objection.

"To Mr. Matthew Lea Burgess.

"I hereby give you notice that I object to your name being retained on the list for the township of Macclesfield of persons entitled to vote in the election of members for the borough of Macclesfield. Dated this 25th day of August, 1856.

"JOSEPH BARCLAY, of No. 2, Peel Street, 96, Park Terrace, Park Lane, on the list of voters for the township of Macclesfield."

The duplicate was addressed on the back, as follows:—

"Matthew Lea Burgess,
"13, Park Street, Macclesfield."

The notice of objection was sent by post, open.

It was urged by or on behalf of Burgess that the duplicate did not *on the face of it* show his place of abode, although it appeared on the outside of both.

The revising barrister held that this objection to the notice was good, and did not call upon Burgess to prove his qualification; nor did he offer to do so.

*50] *The name of Burgess and also the names of sixty-two other persons, who were objected to in the same manner and by the same party, and whose cases were consolidated with the principal case, were retained on the list, the revising barrister holding the notice of objection to be insufficient.

The question for the opinion of the court was, whether the above notice of objection was sufficient; if the court should be of opinion that it was, the names of Matthew Lea Burgess and those of the sixty-two other persons referred to were to be expunged from the register.

Welsby, for the appellant.—The notice of objection in this case was sufficient, and the decision of the revising barrister was wrong. [CRESSWELL, J.—Is there any section in the 6 & 7 Vict. c. 18, which requires the residence of the person to whom the notice is sent to be shown upon the face of it?] In the case of counties, the form No. 5, in schedule A., requires the insertion of the "place of abode as described" in the list or register; but, in boroughs, the form No. 11, in schedule B., requires no such thing. The only question is whether the objector has properly complied with the 100th section, which enacts that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." Here, the notice *was* so directed. [CRESSWELL, J.—And the party received it,] And he appeared. The clause goes on to provide, that, "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same,

*51] *duly directed*, open, and in duplicate, to the *postmaster of any post-office where money-orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed 2*d.* over and above the ordinary rate of postage), as shall from time to time be made by the postmaster-general in that

behalf; and, in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate, shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." All that has been duly complied with. The revising barrister was probably misled by the case of Birch, App., Edwards, Resp., 5 C. B. 45 (E. C. L. R. vol. 57). There, however, the objection to the copy served, was, that it was not a duplicate at all. Here, it was.

Byles, Serjt., for the respondent.—This case, it is submitted, is disposed of by that referred to,—Birch, App., Edwards, Resp.,—where it was held, that the service of a notice of objection by post, under the 6 & 7 Vict. c. 18, s. 100, was not proved by the production of a stamped copy similar in all respects to the notice left with the postmaster save that it had no *external address;* such copy not being a stamped *duplicate*, within the meaning of the act. [CRESSWELL, J.—In that case the supposed duplicate had no address at all.] None on the *outside*, [*52 *and the court held *both* to be necessary. Williams, J., says: "If the notice is to be sent by the post, it cannot be said to be *duly directed* for that purpose, unless it *also* bears an external address." The act of parliament requires the notice to contain the place of abode of the person objected to. [CRESSWELL, J.—The form No. 11 in schedule B. does not, as the form No. 5, in schedule A. (which is applicable to *county* voters) does.] There certainly is that difference between the two forms though it is not easy to assign a satisfactory reason for it.

CRESSWELL, J.—There is nothing in the act of parliament, or in the form given in the schedule of a notice of objection to a borough voter, to render it necessary to mention the voter's place of abode. The appeal must, therefore, be allowed. The result of this decision being to take away the franchise from the several parties objected to, that is an additional reason for not giving costs.(*a*)

The rest of the court concurring,

Appeal allowed without costs.

(*a*) See 17 C. B. 315, n.; antè, pp. 22, 33; post, p. 62.

*53] *Borough of ASHBURTON.

JOHN HANNAFORD, Appellant, WILLIAM ROLSTONE WHITEWAY, Respondent. *Nov.* 14.

A notice of objection sent by post, pursuant to the 100th section of the 6 & 7 Vict. c. 18, is not vitiated by the fact of the postmaster having received it out of the usual hours of business prescribed by the postmaster-general.

AT a court held for the revision of the lists of voters for the borough of Ashburton, William Rolstone Whiteway objected to the name of John Hannaford being retained on the list of voters for the parish of Ashburton.

The facts of the case were as follows:—

The objector, being a person qualified to object, gave due notice of objection to the overseers; and he sought to prove service of the notice of objection on the party himself by post under the statute 6 & 7 Vict. c. 18, s. 100. All the provisions of that section were strictly complied with, except as to the time when the duplicate notices were delivered to the postmaster.

The objector delivered the duplicate notice to the postmaster of the post-office of Ashburton, at 6 o'clock in the morning of Monday, the 25th of August, 1856. He produced before the revising barrister one of the duplicates bearing the Ashburton post-mark of the 25th of August, 1856; and he proved that the notice would in the ordinary course of post have been delivered on that day at the place to which it was addressed.

During the month of August, 1856, the Ashburton post-office was open to the public, on week days, from 7 o'clock, A. M., until 50 minutes past 8 o'clock, P. M.; and it was not compulsory on the postmaster to register any letter except within those hours. Public notice was given at the office that these were the hours of business.

*54] The hours for receiving the duplicate notices under *6 & 7 Vict. c. 18, s. 100, are the same as those for registering ordinary letters.

It was contended, on behalf of the voter, that the delivery of the duplicate notices to the postmaster before 7 o'clock, A. M., not being within the regular hours of business, was irregular; that, before the stamped duplicate could be produced in evidence, the objector was bound to prove that he had complied with all the provisions of the 6 & 7 Vict. c. 18, s. 100, and, amongst other things, that he had delivered the notices to the postmaster within the hours appointed for the transaction of that business; and that, as he failed to prove this, the stamped duplicate could not be received as evidence of the notice having been given as required by the act.

The revising barrister was of opinion, that, as the postmaster had

consented to receive and compare the notices, although delivered to him at an hour when he was not bound to do so, the statute had been sufficiently complied with; and he decided that the notice of objection was duly proved. He therefore called upon the voter to prove his qualification; which he failed to do; and the revising barrister thereupon expunged his name from the list.

If the court should be of opinion that the delivery of the duplicate notice to the postmaster at the time above stated was not sufficient within the meaning of the statute 6 & 7 Vict. c. 18, s. 100, the name of the voter John Hannaford was to be restored to the list.

Kinglake, Serjt., for the appellant.—The provisions as to notices of objections, in the case of borough voters, are contained in ss. 17, 40 and 100, of the 6 & 7 Vict. c. 18. The 17th section enacts "that every person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person as not *having been entitled on the last day of July next preceding to have his name [*55 inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th day of August, in that year, give or cause to be given a notice, according to the form numbered 10 in the said schedule B., or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted, or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough; and *every person so objecting shall also give or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice according to the form numbered* 11 *in the said schedule B.;* and every notice of objection shall be signed by the person objecting." The 40th section amongst other things enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers or by any other person, and such other person shall appear, by himself or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." And then comes s. 100, which provides, that, "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver *the same, duly directed, [*56 open, and in duplicate, to the postmaster of any post-office where

money-orders are received or paid, *within such hours as shall have been previously given notice of at such post-office*, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed 2*d.* over and above the ordinary rate of postage), as shall from time to time be made by the postmaster-general in that behalf; and in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of *such stamped duplicate* shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." Thus, the statute points out various modes of serving notices of objection. The service may either be personal, or by leaving the document at the place of abode of the person objected to as stated in the list, or the person objecting may avail himself of the mode of service pointed out in s. 100. But, if the person objecting chooses to adopt this latter course, it is clear, that, as between him and the person objected to, the latter has a right to have a notice transmitted in strict accordance with the provisions of the act; all the conditions which the legislature has, for sufficient reasons no doubt, thought fit to impose must be complied with. The production of *such* stamped duplicate,—that is, a stamped duplicate with reference to which all the conditions have been complied with,—is made evidence of the original notice having reached the hands
*57] of the *person objected to according to the ordinary course of post. It is not for the court to say whether that which the act of parliament requires is wise or not: the only question is, whether the conditions annexed to this mode of service have been strictly and properly complied with. This matter underwent considerable discussion in Bishop, App., Helps, Resp., 2 C. B. 45 (E. C. L. R. vol. 52), the judgment in which case contains almost all that can be said upon the subject. There, a notice was posted, under s. 100, in sufficient time to reach the party, according to the ordinary course of the post, on the 25th of August; and it was held that such service was sufficient, notwithstanding that the actual delivery was accidentally delayed until the 27th. In delivering the considered judgment of the court, Tindal, C. J., says: "It was argued, on the part of the respondent, that the true construction of this section was, that it should be sufficient if the notice was *effectually* sent, that is, sent and *delivered*. And there is no doubt that this would be sufficient: but it would, at the same time, be unnecessary to have this provision, which is a very special one, in order to make such a sending sufficient; for, there is no doubt that

any sending and delivery, by a servant or otherwise, by which the notice came to the voter, would be sufficient by the 7th section. It is, therefore, evident that some privilege is meant to be conferred by s. 100 on a mode of dealing with the notice which is so carefully provided for. The notice must be delivered at a select description of office; *within certain hours;* the postage must be paid; it must be registered, and the fee for registration must be paid; it must be delivered to the postmaster, open, and in duplicate; compared; stamped; and the duplicate returned. And we think the meaning of the act is this,—*when all these conditions are complied with, such a sending shall be a sufficient substitute for what the 7th section required to be done,* that is, a sufficient substitute for *giving the notice to the person objected to, or leaving it at his place of abode." This *privilege* is not to be extended to one who has failed to comply with any one of the conditions. [*58 Another part of the judgment shows that this very objection was present to the mind of that learned judge: for, he says,—" If this be the true construction of that part of the section which provides what sending is sufficient, it follows that the objector has done all that the act requires him to do, to enable him to call on the voter to prove his right, whether the notice arrived or not, and whether it was prevented from arriving by insufficient description of the place of abode or by default of the post-office. So that, supposing, as was insisted for the respondent, that the evidence of the stamped duplicate is not conclusive as to arrival, and was answered by proof to the contrary, as it was here, it makes no difference as to the right of the objector; as the fact so disproved is not material to his right. The stamp on the duplicate is clearly evidence of the posting on the 24th; and there was no contradiction as to that fact; so that, whatever might be the consequence if it had been shown in evidence that the notice was not really posted on the 24th, as the proof stood, all the facts constituting a sufficient sending were proved without contradiction." The same determination was come to in Bayley, App., The Overseers of Nantwich, Resp., 2 C. B. 118 (E. C. L. R. vol. 52), in the case of a notice of *claim,* which was duly posted at Manchester on the 19th of July, and ought according to the ordinary course of post to have been received by the overseers at Nantwich on the 20th, but, in consequence of extraordinary pressure at the post-office, had been delayed until the 22d. Toms, App., Cumming, Resp., 7 M. & G. 94 (E. C. L. R. vol. 49), 8 Scott, N. R. 910, 1 Lutw. Reg. Cas. 200, also shows how rigidly the court will inquire whether the conditions on which the stamped duplicate is to be received in evidence have been complied with. There, the original *notice was signed by the objector himself, in accordance with s. 17, but the copy was signed by an agent in his name. [*59 [CRESSWELL, J.—And therefore it was held not to be a duplicate.] The statute is no less positive as to the hours of posting the notice,

than that it shall be delivered to the postmaster in duplicate. Birch, App., Edwards, Resp., 5 C. B. 45 (E. C. L. R. vol. 57), is important with the same view: the stamped copy offered in evidence was a perfect duplicate in all respects, save that it had not the external address which appeared on the original. An external address was required only by s. 100. The notice would have been perfectly good without it, if served personally or at the place of abode. But the court held a strict adherence to the directions of the statute to be requisite. [Cresswell, J.—The first part of s. 100 enacts that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." Suppose the person objecting proved that such a notice was sent by post, addressed to the voter, and that the voter received it in due time,—would that be sufficient?] It would still be necessary to give notice to produce the original, in order to let in secondary evidence of its contents. [Cresswell, J.—I assume all that to have been done, and that the postman proves the delivery.] That probably would be a sufficient notice under s. 17. The proof by means of the stamped duplicate, however, can only be resorted to where the conditions imposed thereon by the legislature have been strictly observed. In Godsell, App., Innous, Resp., 17 C. B. 295 (E. C. L. R. vol. 84), a notice of objection to a county voter was addressed "to the overseers of the parish or township of B," without adding the county, as required *60] *by the 6 & 7 Vict. c. 18, s. 101. The overseers having acted upon the notice, although it did not appear when it reached their hands,—it was contended, on behalf of the objector, that the overseers had no right thus to waive the performance of a condition required by the statute: and the court seemed to think the argument well founded. [Cresswell, J.—The Lord Chief Justice seemed to consider that the party had an interest in the objection.] If the court should hold that it is competent to the postmaster to extend the time limited for the reception of these notices, it might be enabling him to extend facilities to one political party to the prejudice of the other.

Byles, Serjt., contrà, was stopped by the court.

Cresswell, J.—It appears to me that there is nothing whatever in the objection which has been urged in this case; and that those which have been cited are perfectly distinguishable. There is no pretence for saying that the postmaster is not at full liberty to receive a notice of this sort at any hour which will enable him to send it off in due time. The first branch of the 100th section says that "it shall be sufficient, in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall be sent by the post, free

of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent at his place of abode as described in the said list of voters." The second branch provides for what the person sending the notice shall do,—"And, whenever any person shall be desirous of sending any such notice of objection, by the post, he shall deliver the same, duly directed, open, and in duplicate, to the postmaster of any post-office where money-orders are received or paid, within such hours as shall have been previously *given notice of at the post-office, and under such regulations with respect to the registration of such letters, &c., as shall from time to time be made by the postmaster-general in that behalf." Unless the party does that, he cannot claim to have his notice sent by the post. The clause then goes on to provide, that "in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office." Now, the postmaster was not bound to receive the notice in question out of the usual office hours; therefore the person objecting could not place himself in a position to demand the performance of this duty by the postmaster. It seems to me that this was merely meant for the purpose of giving the objector information as to what he is to do to entitle him to the means of proving the sending of the notice, by the stamped duplicate. [*61

CROWDER, J.(a)—I am of the same opinion. The object of the 100th section was, to give power to the objector to forward the notice of objection by post, and also to give him a particular mode of proof of the notice. It is necessary, in order to enable the objector to obtain the stamped duplicate, that the original notice should be delivered to the postmaster in due time. There is nothing in the act to satisfy me that it was intended to be a condition essential to the validity of the notice, that it should be delivered to the postmaster within the hours appointed by the postmaster for that purpose. If the postmaster had declined to receive the notice after the hour limited for the receipt of these documents, the party *would lose the opportunity of availing himself of this statutory mode of service. But, as the postmaster thought fit to receive it, I see no difficulty in holding the service to be good. [*62

CRESSWELL, J.—This being an appeal against the decision of the revising barrister, which decision we think was perfectly right, the appeal must be dismissed with costs.

Appeal dismissed with costs.

(a) Williams, J., was absent, on account of indisposition; and Willes, J., was sitting at Nisi Prius.

Borough of ASHBURTON.

EDWIN PADDON and MOSES WOOLLAND, Appellants. WILLIAM ROLSTONE WHITEWAY, Respondent. *Nov.* 14.

See the syllabus of the preceding case.

THIS case differed from the last only in this,—that the notices of objection were delivered in duplicate to the postmaster at the post-office at Ashburton *at 6 o'clock in the evening, of Sunday, the 24th of August*, 1856. The stamped duplicates produced had the Ashburton post-mark of the 24th of August; and it was proved, that, in the ordinary course of post, the notices would have been delivered on the 25th, at the places of abode to which they were respectively addressed. During the month of August, 1856, the Ashburton post-office was open to the public on Sundays only from half past 7 o'clock A. M. until 10 o'clock A. M.; and it was not compulsory on the postmaster to register any letter on Sunday except within those hours.

The same objection was taken as in the preceding case, and the revising barrister came to the same conclusion.

Appeal dismissed, with costs.

*63] *County of DURHAM,—Northern Division.

JOHN HORNSBY, Appellant, JOHN STEPHENSON ROBSON, Respondent. *Nov.* 14.

Where a notice of objection, properly directed, is posted according to the provisions of the 6 & 7 Vict. c. 18, s. 100, the production of the stamped duplicate is sufficient evidence of the due service of the notice, although, in consequence of a delay (however caused) in the post-office, it does not reach the hands of the person objected to until after the time prescribed by the statute.

AT a court held for the revision of the list of voters for the northern division of the county of Durham, at Lanchester in the said division, John Stephenson Robson, being on the register of voters for the time being for the said division, objected to the name of John Hornsby being retained on the list of voters for the township of Greencroft in the said list of voters.

The said John Hornsby appeared and took a preliminary objection, viz., an objection to the sufficiency of the service of the notices of objection required by the statute in that behalf to be given by the said John Stephenson Robson to the said John Hornsby and to the overseers of the poor of Greencroft aforesaid, which preliminary objection the revising barrister overruled, and held the notices and the services thereof sufficient according to the statute. And the said John Hornsby

having failed to prove that he was entitled on the last day of July then next preceding to have his name inserted in the said list of voters in respect of his qualification as described in such list, the revising barrister expunged his name from the list.

John Hornsby having given notice of his intention to appeal against the decision, the revising barrister stated the following case for the opinion of this court:—

The notices of objection were according to the form prescribed by the 7th section of the statute, and, being signed by the objector with his name at length, and place of abode, and duly directed, the one to the overseers of Greencroft, and the other to the party objected to, as *required by the statute, were, on behalf of the objector, delivered, open, and in duplicate, to the postmaster of the post-office [*64 at Durham, at the proper office, and within the usual hours in that behalf, on the 22d of August, 1856, and, the same being duly registered, and the usual fees being paid, and the said postmaster having compared the notices with the duplicates, the latter, on the same day, returned the duplicates, stamped with the stamp of the post-office, to the persons who brought the same, as required by the said statute, and which duplicates, duly signed by the objector, and stamped with the Durham post-office stamp, indicating that the notices were posted at Durham on the 22d of August, 1856, were produced before the revising barrister on behalf of the objector.

John Hornsby's place of abode is, Greencroft Tower, and is so described in the list of voters; and Greencroft Tower is in the township of Greencroft; and the post-town for Greencroft and Greencroft Tower is Lanchester.

According to the usual course of the post between Durham and Lanchester, letters posted at Durham reach Lanchester on the same day they are posted, or the day after at latest; and Lanchester letters are usually delivered to the parties to whom they are addressed on the same day they arrive at Lanchester. But the notices in question did not in fact arrive at Lanchester until the morning of the 26th of August, and were delivered to the parties to whom they were directed, in the course of the same day, and not before. The delay arose in the post-office at Durham, from whence the notices were despatched so late that they did not reach Lanchester until the morning of the 26th of August, as above stated. It did not appear that any blame was imputable to the above objector, or his agents, in posting the said notices, or touching the miscarriage of the same or the delay aforesaid.

*Upon proof of the facts above stated, it was contended, on behalf [*65 of John Hornsby, that the service of the notices of objection was too late and insufficient. The revising barrister ruled that by the 100th section of the statute the service was sufficient; and, Hornsby having failed to prove that he was entitled to have his name on the list of voters,

in respect of his qualification therein stated, he expunged his name from the list of voters.

By the like ruling upon the like preliminary objections, and upon the same state of facts, mutatis mutandis, with the exception of the peculiarities hereinafter mentioned,(a) the revising barrister likewise expunged from the list of voters for Greencroft aforesaid the names of the eleven persons following, viz., Joseph Johnson, George Davidson, James Brown, Isaac Waugh, John Waugh, Ralph Norton, Thomas Turbot, Joseph Heron, John Whitfield, Joseph Clarkson, and William Whitfield, who were severally objected to by the said John Stephenson Robson, and who severally failed to prove that they were entitled to have their names on the said list in respect of their qualifications as described therein.

It was peculiar to the cases of John Waugh and Ralph Norton, that the notices of objection sent by the post to them, and which were produced before the revising barrister on their behalf respectively, bore two Durham post-marks on the back thereof—the one dated the 22d of August, and the other the 25th of August, 1856: and the notice to John Waugh appeared to have been re-directed, by cancelling "Greencroft Hill," the place of his abode as described in the list of voters, and substituting "Warkworth, Auckland, Northumberland;" and the notice to Ralph Norton appeared to have been re-directed by adding to "Hag Hill," the place of his abode as described in the list
*66] of voters, "Axwell Park, Gateshead:" *and the only explanation of these peculiarities that was offered before the revising barrister, was, that the notices were posted at Durham on the 22d of August, reached Lanchester in the usual course of the post, were then re-directed by the postmaster at Lanchester, and by him sent back to Durham on or before the 25th of August.

It did not appear that the objector, John Stephenson Robson, or any agent of his, was privy to the said re-direction of or dealing with the said notices by the said postmaster at Lanchester as aforesaid.

It was peculiar to the case of William Whitfield, that, in the list of voters, his place of abode was described as "Greencroft Lodge," but, in the body of the notice of objection addressed to the overseers of Greencroft, the place of abode of William Whitfield was described as "Greencroft" only. Greencroft Lodge is in the township of Greencroft; and the variance did not mislead the overseers of Greencroft, either touching the identity of the said William Whitfield, or in any other respect.

The cases were consolidated.

Manisty appeared to support the appeal.

CRESSWELL, J.—This case is disposed of by that of Bishop, App.,

(a) See Prior, App., Waring, Resp., 5 C. B. 56 (E. C. L. R. vol 57), 2 Lutw. Reg. Cas. 45, and Robson, App., Brown, Resp., antè, p. 34.

Helps, Resp., 2 C. B. 45 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 353. The appeal must be dismissed with costs. The person objecting has done all that the statute requires of him; and he is not responsible for the delay at the post-office.

CROWDER, *J.*, concurring, Appeal dismissed, with costs.

END OF THE REGISTRATION CASES.

*MORISSE *v.* THE ROYAL BRITISH BANK. *Nov.* 25. [*67

A creditor who has obtained judgment against a joint-stock banking company, and has ineffectually issued execution against their property and effects, is, under the 7 & 8 Vict. c. 113, ss. 10, 13, entitled *as of right* to execution against a shareholder, on complying with the conditions imposed by the statute.

And it is no answer to a motion for that purpose, that the affairs of the company are in course of arrangement under the winding up acts and under a fiat in bankruptcy, and that assets to a large amount are already in the hands of the official manager, and that there is reasonable ground to believe that within a short (but indefinite) time enough will be realised to meet all the engagements of the concern.

Personal service of the ten days' notice required by s. 13 is not necessary: it is sufficient if the notice is left with a servant at the dwelling-house of the person sought to be charged.

The 10th section of the 7 & 8 Vict. c. 111, which enacts that the rights of creditors as against the person, property, and effects of shareholders shall not be prejudiced or affected by proof under a fiat against the company, and that no execution shall be issued against the person, property, or effects of any member, until after proof of the debt under the fiat, is not repealed by the 182d section of the general bankrupt act, 12 & 13 Vict. c. 106, which enacts that the proving or claiming a debt under a fiat shall be deemed an election by the creditor to take the benefit of such fiat,—that provision being merely a re-enactment of the 59th section of the 6 G. 4, c. 16.

LUSH, on a former day in this term, obtained a rule calling upon Mr. Richard Hartley Kennedy to show cause "why execution upon the judgment recovered by the plaintiff in this cause for the sum of 214*l.* 11*s.* 6*d.*, should not be issued against the person, property, and effects of the said Richard Hartley Kennedy as a shareholder of the said bank, to satisfy the said sum of 214*l.* 11*s.* 6*d.* recovered in this cause pursuant to the act 7 & 8 Vict. c. 113."

The affidavits upon which the motion was founded were those of the plaintiff and of the two clerks of his attorney, which stated in substance as follows:—That the action was commenced against the Royal British Bank on the 8th of September last, to recover the sum of 205*l.* 13*s.* 4*d.*, being the balance due to the plaintiff on his drawing account: That, on the 24th of September, an order was made by Kindersley, V. C., to wind up the affairs of the said bank under the Joint Stock Companies Winding-up Act, 1848: That, on the 21st of October last, the plaintiff made an affidavit of his said debt under and in pursuance of the Joint Stock Companies *Winding-up Act,(*a*) and such affidavit was [*68

(*a*) Under the Joint Stock Companies Winding-up Act, 1848,—11 & 12 Vict. c. 45, s. 73,—the creditor is required to prove his debt before the Master before commencing or proceeding with any action against the official manager or against the company.

filed on the same day at the proper office for that purpose, and the office copy of such affidavit was on the following day sent by the plaintiff's attorney to the defendant's solicitors: That, on the same 21st of October last, the plaintiff's pass-book was left by him at the said bank to be made up, and it was made up and returned to him on the same day; and the said book then showed a balance standing to his credit amounting to 205*l.* 13*s.* 4*d.*: That, on the 9th of October last, a petition for adjudication of bankruptcy was presented against the said Royal British Bank, under which adjudication of bankruptcy had been made: That, on the 3d of November instant, judgment was obtained by the plaintiff against the said Royal British Bank in this action for 205*l.* 13*s.* 4*d.*, and 8*l.* 18*s.* 2*d.* for costs, making together 214*l.* 11*s.* 6*d.*: That, on the 4th of November instant, a writ of fi. fa. was issued in this action upon the above judgment, directed to the sheriffs of London, to levy the sum of 214*l.* 11*s.* 6*d.*, with interest, costs of execution, &c., upon the effects of the Royal British Bank, at the head offices in Threadneedle Street; and on the same day the sheriffs made a return of nulla bona: That the deponent had been informed, and verily believed, that the official manager, under the said order of the Vice-Chancellor Kindersley for winding up the said Royal British Bank, had possessed himself of the property and effects of the said Royal British Bank under that order, and that such property and effects were insufficient to pay the debts of the said Royal British Bank, and the deponent verily
*69] believed that any further execution against the *property of the said Royal British Bank upon the judgment in this action would be unavailing, and that his only prospect of obtaining full satisfaction for his said debt was by proceeding against the individual members or shareholders of the said Royal British Bank: That a notice requiring payment of the said debt due upon the said judgment was served by his (the plaintiff's) attorney on Richard Hartley Kennedy, a shareholder in the said bank, on the 5th of November instant: That the first meeting for proof of debts under the bankruptcy of the said Royal British Bank took place at the Court of Bankruptcy, London, on the 6th of November instant, and the deponent attended the meeting, and there proved his said debt under the said bankruptcy, in the form prescribed by the bankrupt laws, and such his proof was then admitted, and still remained on the said proceedings in bankruptcy: That the said debt of 205*l.* 13*s.* 4*d.*, with 8*l.* 18*s.* 2*d.*, the costs of the said action, making together the said sum of 214*l.* 11*s.* 6*d.*, was still justly due to him from the said Royal British Bank, and he had used every exertion to obtain payment of his said debt from the funds and property of the said company, but no payment in respect thereof had been made to him: That it was very uncertain when any dividend would be paid in respect or on account of his said debt, for that questions had arisen, and were still undetermined, as to whether the affairs of the said bank were to be wound up under the

superintendence of the Court of Chancery or of the Court of Bankruptcy, and the deponent was informed and believed that the parties contesting such questions threatened and intended to appeal to the House of Lords for the settlement thereof.

The affidavit of one of the clerks to the plaintiff's attorney stated, that he did on the 5th of November instant serve Richard Hartley Kennedy, of, &c., with a notice (setting it out), stating that judgment had been *obtained in this action against the bank, and a return of nulla bona made to a fi. fa. issued against the bank, and that, unless he paid to the plaintiff's attorney within ten days from the date of the notice the amount due upon the judgment, application would be made to the court for leave to issue execution against his person, property, and effects, as a shareholder in the said bank, "*by delivering to and leaving with the footman of the said Richard Hartley Kennedy, at his residence, at, &c., a true copy of the said notice:*" That the deponent did, on the 6th of November instant, search at the office of returns to be made by banks, at Somerset House, for the last return made by the above-named Royal British Bank, and the name of Richard Hartley Kennedy, alderman, appeared on the list of shareholders returned to the said office in the month of June last, and that the said Richard Hartley Kennedy was and still is a shareholder in the said Royal British Bank. [*70

There was also an affidavit verifying the signature of the commissioner of Her Majesty's inland revenue to the return of shareholders of the Royal British Bank.

Hugh Hill, Q. C., and *Aspland*, now showed cause, upon the affidavits of Mr. Kennedy and his attorney. The former stated that the writ of summons in this action was issued on the 8th of September last, and judgment was signed on the 3d of November, and the writ of fi. fa. issued on the 4th: That the said bank was a company established for the purpose of carrying on the business of banking under the 7 & 8 Vict. c. 113: That, on the 9th of October last, a petition for adjudication of bankruptcy against the said bank was presented, under the provisions of the 7 & 8 Vict. c. 111, for facilitating the winding-up of the affairs of joint stock companies unable to meet their engagements, by a creditor of the said bank, to the Court of Bankruptcy *in London, on which upon the same day the said bank was adjudicated bankrupt, and Mr. Charles Lee was appointed official assignee of the estate and effects of the said bankrupt company, and on the 6th of November creditors' assignees were appointed: That, on the 6th of November, the plaintiff attended a meeting for proof of debts under the said adjudication, and then proved as a creditor under the said adjudication the debt sought to be recovered by him in this action, and such proof was duly admitted: That, on the 6th and 12th of September respectively, petitions were presented to the Court of Chancery for winding up the affairs of the said bank under the Joint Stock Companies Winding-up Acts, on [*71

which said petitions an order absolute for winding up the said bank was made under the provisions of the said acts by the Vice-Chancellor Kindersley on the 24th of September: That, on the 27th of September, Mr. Harding was appointed interim manager of the property, assets, and effects of the said company under the 20th section of the Winding-up Act, 1848; and, on the 30th of October last, he was appointed official manager, under the same statute: That no proceeding had been taken by any person for setting aside or avoiding the said order absolute: That the deponent had obtained information from the said official manager, and found from him (which he has no doubt to be true) that the said official manager has money (being assets of the bank) in his hands, to an amount exceeding 100,000*l.*, ready to be divided amongst the plaintiff and the other creditors of the bank, and that the said official manager would be able to collect, and would collect, further sums, to the amount of 150,000*l.*, within a short time, and not exceeding a very few months from the present time, which sum would be applicable to a further dividend; and that further sums, to the amount of 50,000*l.*, and *72] upwards, would be realized *from the existing assets of the company within the same time, or a short time thereafter: That the deponent had also ascertained from Mr. Coleman, who acted as accountant, and had investigated the affairs of the said bank, and prepared a balance-sheet, which was laid before a meeting of shareholders of the said bank held in September last (and which information he believed to be true), that, of the assets of the said bank, 100,000*l.*, in addition to the 100,000*l.*, and upwards now in hand, would be collected and got in ready for division among the creditors within three months from the present time, besides other considerable sums which might probably be realized within a short time, by sale of the various premises in which the bank lately carried on business, and that the assets of the said bank would produce 300,000*l.* in addition to a further large sum expected to be realized by disposing of certain iron-works, part of the assets of the bank: That, on the list of shareholders of the bank were many substantial persons, contributories under the said winding-up order, who were able amongst them to meet all calls which it might be necessary to make for the purposes of satisfying the plaintiff and the other creditors of the bank; and the deponent had no doubt that all calls necessary for that purpose would be speedily made under the said winding-up acts, and that thereby, and by means of the assets of the bank the claims of the plaintiff and of all other creditors would be speedily satisfied, and more speedily than in any other way: That the deponent had ascertained from the said official manager and accountant that they also were of opinion that the contributories of the bank were able to meet the amount of all such calls: And that the deponent had no doubt that the plaintiff and the said other creditors would be speedily satisfied, whether the assignees in bankruptcy or the official manager had the disposition of the said assets of the bank.

*The affidavit of the attorney of Mr. Kennedy stated that he was present on the 24th of November instant in the court of Vice-Chancellor Kindersley, and heard him give judgment in the matter of an application to dissolve an injunction restraining the official assignee and manager under the adjudication of bankruptcy against the defendants from interfering with the assets of the said bank, and also in the matter of another application for an order directing the official manager appointed under the order absolute for winding up the said bank, to deliver over the assets of the said bank to the said official assignee: That his Honour dissolved the ex parte injunction which had been granted on the application of the said official manager, restraining the interference of the said official assignee and messenger with the said assets, and ordered that the said official manager should deliver over the said assets (less the expense incurred in collecting those already realized) to the said official assignee: That, although the effect of his Honour's judgment was substantially to assert the validity of the bankruptcy for the purpose of distributing the existing assets of the estate, his Honour observed that the order absolute for winding up was good and subsisting, and that the official manager would be the party to receive the calls which would have to be made upon the contributories: And that the deponent had no doubt that the assets of the bank already and to be collected, would be speedily distributed, and that all necessary calls for the satisfaction of the creditors of the said bank would be made with as little delay as possible. [*73

1. The material point to consider in this case is, whether or not the court has any discretion,—whether they are bound to permit the execution to go against a shareholder, the judgment-creditor having performed all the conditions prescribed by the statute, or whether they may look at all the circumstances of the case, to see that it is *a fit one for their interference in this summary way. It appears that the affairs of the bank are in course of winding up, and that already a large sum of money is in the hands of the official manager. The 9th section of the act for the regulation of joint stock banks, 7 & 8 Vict. c. 113, enacts that "every judgment, decree, or order of any court of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions thereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, *if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby*, then it shall be lawful [*74

for him to have execution, in satisfaction of such judgment, decree, or order, against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose:" then follows a proviso limiting the extent of the liability of former shareholders. [WILLIAMS, J.—The utmost diligence of the judgment-creditor could not obtain satisfaction out of the moneys in the hands of the official manager: they could not be reached by an execution. WILLES, J., referred to the language of Alderson, B., in Thompson *v.* The Universal Salvage Company, 3 Exch. 310, 319,† where that learned judge said,—"It would be
*75] very unjust, and not a fair construction *of the 7 & 8 Vict. c. 110 (s. 68), that a creditor should proceed against an individual shareholder, when he has a right to go against the assets of the whole company. When he has done so without success, he may again resort to the individual." *Lush.*—In a case in the Court of Exchequer in this term,—Hill *v.* The London and County Insurance Company, 1 Hurlst. & Norm. 398,†—those expressions are repudiated. COCKBURN, C. J.—The real question is, whether the 13th section gives us any discretion. That section enacts, "that, in the cases provided by this act for execution on any judgment, decree, or order, in any action or suit against the company to be issued against the person or against the property and effects of any shareholder or former shareholder of such company,—or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses, paid or incurred by him as aforesaid in any action or suit against the company,—such execution may be issued, *by leave of the court*, or of a judge of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that *it shall be lawful for such court or judge* to make absolute or discharge such rule, or allow or discharge such motion (as the case may be), and to direct the costs of the application to be paid by either party, or *to make such order therein as to such court or judge shall seem fit.*" "Provided that any order made by a judge as aforesaid may be discharged or varied by the court on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made nor summons granted for the purpose of charging
*76] any shareholder or former shareholder, until ten days' notice *thereof shall have been given to the person sought to be charged thereby." The execution is to issue "by leave of the court:" but the question is, whether that means any more than that the court must be satisfied that proper endeavours have been made to put the fi. fa. in force

against the effects of the company. Can we enter into the merits of the question, and take upon ourselves to determine that this or that course will be more expedient for the general benefit of the creditors of the bank?] In a case in the Court of Queen's Bench in the present term,—Palmer *v.* The Justice Assurance Society, 28 Law Times, 120,—that court assumed to have a discretion under the 7 & 8 Vict. c. 110, s. 68, and enlarged the rule for a week; Lord Campbell saying, that, if it was then made to appear that there was a prospect of satisfaction being speedily obtained under the winding-up act, they would enlarge the rule still further. But, the affidavit not being satisfactory in that respect, the rule was ultimately made absolute. Here, the affidavits show the strongest possible grounds for inducing the court to decline to permit the creditor to pursue this very stringent remedy. The statute should receive a large and liberal construction. [COCKBURN, C. J.—It certainly does seem very unjust that one creditor should thus be permitted to complicate this already more than sufficiently intricate matter. But the language of the statute seems to me to leave us no discretion. I fear we have nothing more to do than to see that the execution-creditor has complied with all the conditions which the legislature has thought fit to impose upon him. Having done that, the execution is matter of right.] The 182d section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106,(*a*) makes the proof of a debt an election not to *proceed against the bankrupt by action. In Geikie *v.* Hewson, 4 M. & G. 618, 5 Scott, N. R. 484, pending an action of [*77 debt by A. against B., as acceptor of a bill for 468*l.* 1*s.* 9*d.*, and for 1500*l.* for goods sold and delivered, &c., A. filed an affidavit in the Court of Bankruptcy, under the 1 & 2 Vict. c. 110, s. 8, stating B. to be indebted to A. in 468*l.* 1*s.* 9*d.* for goods sold and delivered, &c., and also upon a bill for 468*l.* 1*s.* 9*d.* Afterwards, on the 11th of February, B., with C. and D. as his sureties, gave a bond to A. conditioned for the payment of such sum as should be recovered in the action for the alleged debt, or for the render of B. On the 15th of March a fiat in bankruptcy was awarded against B. On the 21st of March, A. signed judgment against B. for 1382*l.* 19*s.* 6*d.* On the 5th of April, A. proved under the fiat for 864*l.* 12*s.* 9*d.*, being the amount of the judgment debt, excluding the 468*l.* 1*s.* 9*d.* On the 12th of April, a ca. sa. against B. was lodged with the sheriff. On the 30th of May, A. brought an action against C. and D. on the bond. It was held that the proof under the fiat was an election to relinquish the action against B., and that B. being entitled to be discharged if rendered, C. and D. were entitled to have the proceedings stayed. This raises a very important question,

(*a*) "That no creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy or have any claim entered upon the proceedings, without relinquishing such action or suit; and the proving or claiming a debt under a fiat or petition for adjudication of bankruptcy by any creditor, shall be deemed an election by such creditor to take the benefit of such fiat or petition with respect to the debt so proved or claimed."

and one which the party proceeded against ought to have an opportunity of raising by plea to a scire facias. [*Lush.*—By the 10th section *78] of the 7 & 8 Vict. c. 111,(*a*) the judgment-creditor is obliged *to prove under the fiat against the company, and it is expressly provided that such proof shall not prejudice his right to have recourse against the members.] The 12 & 13 Vict. c. 106, s. 182, being subsequent to that provision, must be taken to have repealed it. There is, therefore, no longer any necessity for proving the demand under the fiat. And there is no injustice in this: the principle of the bankrupt law is, that there shall be an equal distribution of the effects of the bankrupt amongst all his creditors. [WILLES, J.—The 182d section of the 12 & 13 Vict. c. 106, is a mere re-enactment, in the same words, of that part of the 6 G. 4, c. 16, s. 59: it is not therefore a provision enacted since the Joint Stock Companies Winding-up Act, 1844, and *79] consequently does not *repeal it. CROWDER, J.—What answer would you have to a scire facias, assuming your reliance upon the 182d section of the 12 & 13 Vict. c. 106, to be unfounded?] An appeal to the equitable discretion of the court.

3. Then, the 13th section of the 7 & 8 Vict. c. 113, requires, that, previously to the application for execution, ten days' notice shall be given "to the person sought to be charged thereby." Now, the affidavit of service states that the notice was served by delivering it to Mr. Kennedy's footman, at his residence,—not stating that the footman was desired to give the paper to his master,—or that any subsequent inquiry was made of him as to whether he had done so or not; nor is shown to have come to his hands. In Esdaile *v.* Smith, 18 Law Journ. Exch. 120, a rule for a scire facias to have execution against a member of a joint stock company, was served on the father, sister, and son of the defendant, at the defendant's residence; and it was held not to be good service. [WILLES, J.—*Personal* service was not necessary,—Doe d. Griffiths *v.* Marsh, 4 T. R. 464: a footman is of all persons the most proper person to whom to deliver a notice that is intended for his

(*a*) Which enacts "that no action, suit, or other proceeding by any creditor or creditors of any such company or body, shall, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof, be deemed to prejudice or in any manner affect the right of such creditor or creditors to sue out or prosecute a fiat against such company or body, or his or their right to prove or claim under any fiat against such company or body any debt or demand remaining unsatisfied; and *that no such fiat, or proof or proceeding thereunder, shall be deemed to prejudice or in any manner affect the right of any creditor or creditors of such company or body to institute or maintain any action, suit, or other proceeding, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof:* Provided always, that nothing herein contained shall prevent remedy against copartners: Provided also, that *no execution* in respect of any debt or demand provable under the fiat against any such company or body adjudged bankrupt, *shall be issued against the person, property, or effects of any member or members* for the time being of such company or body, or any former member or members thereof, *until after such debt or demand shall have been proved under such fiat,* nor shall any such execution be issued after the appointment of a receiver in manner hereinafter mentioned, without leave of the High Court of Chancery."

master. CROWDER, J.—It is not pretended that the notice did not reach the hands of Mr. Kennedy.] The giving of notice is a condition imposed by the act: the party moving should at least be in a position to prove facts sufficient to induce a belief that the notice came to the hands of the person sought to be charged ten days before the motion.

Lush and *Beasley*, in support of the rule.—The judgment-creditor has a right given to him by the statute, and, having done all that the statute requires him to do as the condition upon which he is to be entitled to exercise that right, this court has no power to deprive him of it. The 9th section of the 7 & 8 Vict. c. 113, enacts "that every judgment, decree, or order of any *court of justice in any proceeding against the company, may be lawfully executed against, [*80 and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The legislature thus shows itself scrupulously anxious to preserve the rights of creditors. Then comes the 10th section, which enacts "that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, *if such execution shall be ineffectual to obtain satisfaction* of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment, decree, or order, against the person, property, and effects of *any shareholder*, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who *was a shareholder* of the company at the time when the cause of action against the company arose." Then follows in s. 13 the machinery by means of which that right is to be enforced,—"In cases provided by this act for execution on any judgment, decree, or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company,—or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company,—*such execution may be issued by leave of the court* or of a judge of the court in which *such [*81 judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that *it shall be lawful* for such court or judge to make absolute or discharge such rule, or allow or dismiss

such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit." Permissive words like these, in other acts, have been held obligatory: see Macdougall *v.* Patterson, 11 C. B. 755 (E. C. L. R. vol. 73) (overruling Jones *v.* Harrison, 6 Exch. 328,† 2 L. M. & P. 257); Orchard *v.* Moxsy, 2 Ellis & B. 206 (E. C. L. R. vol. 75); Crake *v.* Powell, 2 Ellis & B. 210; Reid *v.* Gardner, 8 Exch. 651.† [COCKBURN, C. J.—According to your argument, even though the proceedings under the winding-up acts, and in bankruptcy, will eventually produce 20*s.* in the pound, the judgment-creditors may in the mean time fall upon any one shareholder and ruin him!] That undoubtedly is the law. [COCKBURN, C. J.—It *may* be so.] The winding-up acts have nothing whatever to do with the creditors. The 10th section of the 7 & 8 Vict. c. 111,—which is also a winding-up act for these companies,—expressly reserves the rights of creditors. It enacts "that no action, suit, or other proceeding by any creditor or creditors of any such company or body shall, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof, be deemed to prejudice or in any manner affect the right of such creditor or creditors to sue out or prosecute a fiat against such company or body, or his or their right to prove or claim under any fiat against such company or body any debt *82] or demand remaining unsatisfied; and *that no such fiat, or proof or proceeding thereunder, shall be deemed to prejudice or in any manner affect the right of any creditor or creditors of such company or body to institute or maintain any action, suit, or other proceeding, so far as concerns or may be necessary for the recourse of such creditor or creditors against the person, property, or effects of any member or members thereof for the time being, or any former member or members thereof: Provided always, that nothing herein contained shall prevent remedy against copartners: Provided also, that no execution in respect of any debt or demand provable under the fiat against any such company or body adjudged bankrupt, shall be issued against the person, property or effects of any member or members for the time being of such company or body, or any former member or members thereof, until after such debt or demand shall have been proved under such fiat, nor shall any such execution be issued after the appointment of a receiver as hereinafter mentioned, without leave of the High Court of Chancery." [CROWDER, J.—As the commencement of the 13th section of the 7 & 8 Vict. c. 113, shows that the party must have put himself in a position to demand execution against the shareholder, how do you deal with the words at the end "or to make such order therein as to such court or judge shall seem fit?"] It may be that the court may see reason to doubt the truth of

the affidavits upon which the application is founded; or it may be that the application is at the suit of a shareholder, under ss. 11, 12,(*a*) who has been compelled to pay the *judgment-creditor; or the applicant may be a debtor to the company, in respect of calls or otherwise. [*83 The statute clearly never intended to give the court any discretion where the judgment-creditor has done all that is required of him. Indeed, it would seem absurd to hold that the 13th section gives the court a discretion, when the 10th section had already given the creditor an absolute right. [COCKBURN, C. J.—The right of the judgment-creditor is to be exercised with the leave of the court. If the court see reason to think that great injustice will be done by allowing execution to issue, surely they may suspend the rule.] It would be remarkable if any such discretion were given to the court, from any consideration of mercy to the shareholder, when the legislature has been so careful to preserve the rights of creditors intact. Thompson *v.* The Universal Salvage Company, 3 Exch. 310,† was decided upon the 66th section of the 7 & 8 Vict. c. 110, the words of which are somewhat different from those of the 10th section of the 7 & 8 Vict. c. 113. [CROWDER, J.—The language of both is substantially the same. Under the one, the applicant must show that he has used "due *diligence" to obtain satisfaction from the company; under the other, that his execution against the company is "ineffectual."] [*84 The case of Hill *v.* The London and County Assurance Company is decisive of the question. Martin, B., there says: "My attention has been particularly called to the effect of the winding-up acts, while sitting at Chambers with Cresswell, J. We were referred to a judgment of Vice-Chancellor Page Wood, in which that learned judge stated the true construction of the winding-up acts. At the time of the decision in Thompson *v.* The Universal Salvage Company, it was supposed that the acts were intended to interfere with creditors. But, on further consideration, courts of equity have concluded that the statutes have not that effect. The real object was to compel the shareholders to contribute and pay equally according to their interests. They do not affect creditors, but leave them free to pursue their com-

(*a*) Section 11 enacts, "that every person against whom or against whose property or effects any such execution shall have been issued, shall be reimbursed out of the property and effects of the company, for all moneys paid, and for all damages, costs, and expenses incurred by him by reason of such execution, or of the action or suit in which the same shall have issued, or, in default of such reimbursement, by contribution from the other shareholders of the company."

And s. 12 enacts, "that, if any such execution be issued against any present or former shareholder of the company, and if, within fourteen days next after the levying of such execution, he be not reimbursed, on demand, out of the property and effects of the company, all such moneys, damages, costs, and expenses as he shall have paid or incurred in consequence of such execution, it shall be lawful for such shareholder, or his executors or administrators, to have execution against the property and effects of the company in satisfaction of such moneys, damages, costs, and expenses; and the amount of such moneys, damages, costs, and expenses shall be ascertained and certified by one of the masters or other officer of the court out of which such execution shall issue."

mon-law remedies. But, as it is desirable that the official-manager should know what the debts are, parties are compelled to go before the master and prove their debts. The courts of common law stay the proceedings till that is done; but, subject to that, the creditor is free, and can proceed to enforce his judgment in any way he pleases. By the statute these companies are constituted quasi corporations, so that creditors must look for the fruits of their judgments first to the effects of the corporation; but, when that has been done, the shareholders are liable as partners. It is a great misfortune that it has ever been supposed that shareholders are in a different position from ordinary partners."

COCKBURN, C. J.—I was at first disposed to doubt whether the court did not possess some discretionary power under the 7 & 8 Vict. c. 113, s. 13. And, if such discretionary power *had* been vested in the court, I
*85] *should, under the peculiar circumstances of this case, have been very disinclined to allow execution to go against the shareholder. The subject, however, has already been discussed and decided by the Court of Exchequer in the case of Hill v. The London and County Assurance Company, which is precisely in point. That court has held, that the statute leaves us no discretion, and that a creditor who has put himself in a position, by performing the prescribed conditions, to demand execution against a shareholder, is entitled to it as of right: and Martin, B., says, that, not only is that the opinion of the Court of Exchequer, but also that of Vice-Chancellor Page Wood. I very reluctantly yield to the weight of that authority, and hold that this rule must be made absolute.

WILLIAMS, J.—I am of the same opinion. The case of Hill v. The London and County Assurance Company shows that we have no discretion. The remarks of my Brother Martin are fully justified by the terms of the act. The only question is, whether execution is to go or not. A creditor who has obtained a judgment against the company, and has made an ineffectual attempt to obtain satisfaction thereof by execution against the property and effects of the company, and has given the notice required by s. 13, has acquired a legal right; and we are bound to give him the remedy the law allows. There was considerable discussion at one time as to whether the word "may," in the 13th section of the County Court Act, 13 & 14 Vict. c. 61, was discretionary or imperative: the Court of Exchequer, in Jones v. Harrison, 6 Exch. 328,† 2 L. M. & P. 257, at first thought it gave the court a discretion; but this court, in Macdougall v. Paterson, 11 C. B. 755 (E. C. L. R. vol. 73), and afterwards the Court of Queen's Bench in Orchard v. Moxsy, 2 Ellis & B. 206 (E. C. L. R. vol. 75), and Crake v. Powell, 2 Ellis & B. 210, having held the contrary, the Court of Exchequer, in a subsequent case
*86] of *Reid v. Gardner, 8 Exch. 651,† concurred in the view taken by the other courts. I think it is quite impossible to suppose that

the winding-up acts can or ought to have any effect to alter or abridge the rights of creditors. They were evidently intended only for the advantage of the shareholders,—to enforce contribution amongst themselves. The only point which presented any plausibility of argument, was, the suggestion that the 10th section of the 7 & 8 Vict. c. 111 was repealed by the 182d section of the last bankrupt act, 12 & 13 Vict. c. 106. But it is clear that this last-mentioned provision cannot, by merely re-enacting a previous section of the 6 G. 4, c. 16, operate a repeal of the intermediate enactment. Upon the whole I arrive not without some pain at the conclusion that we are bound to make this rule absolute.

CROWDER, J.—I agree with my Lord and my Brother Williams in thinking that the sound construction of the statute in question is, that, where the judgment-creditor has duly performed all the conditions imposed upon him, he is entitled as a matter of right to have the remedy which the statute has given him. The object of the 10th and 13th sections of the 7 & 8 Vict. c. 113, taken together, is, that, the judgment-creditor having done all that is requisite to confer upon him that right, the court shall enable him to carry it out by execution, instead of the more expensive and circuitous proceeding by scire facias. If a scire facias had issued here, the party against whom the application is made would clearly have had no answer. The only answer suggested, viz. that the 10th section of the 7 & 8 Vict. c. 111, is virtually repealed by the 182d section of the 12 & 13 Vict. c. 106, is met by the remark that this latter section is in terms a mere re-enactment of the 6 G. 4, c. 16, s. 59, and therefore could not operate a repeal of the subsequent provision. There is conseqently no answer to this motion, and the rule must be made absolute.

*WILLES, J.—I am of the same opinion. As to the construction of the 182d section of the bankrupt act, there is a recent [*87 case before Vice-Chancellor Kindersley, of Wallace *v.* Blackwell, 3 Drewry, 538, where the change of position of a clause, by its re-enactment in a subsequent statute, was considered not to vary its operation. The other point seems to me to be perfectly clear. The 10th section of the 7 & 8 Vict. c. 113, gives the judgment-creditor a right to have execution against the person, property, and effects of any shareholder, if his execution against the company shall be ineffectual to obtain satisfaction against them. I agree that the 13th section only defines the mode of enforcing that right. I apprehend no answer could be made to the motion, when the creditor has complied with all the conditions imposed by the statute. The words in s. 13, "it shall be lawful for such court or judge to make such order therein as to such court or judge shall seem fit," are a mere expression of the power that is inherent in the court. Expressio eorum quæ tacitè insunt nihil operatur. The meaning is, that the court shall make an order, not according to attributive justice, but according to the usage and prac-

tice of the court. The court would not, for instance, have power to give time to a debtor. The doubts entertained by my Lord appear to have prevailed in the case of Thompson *v.* The Universal Salvage Company. But that case has since been to that extent overruled. It is now clearly settled that the winding-up acts were only intended to operate as between the shareholders themselves,—to give the official manager the means of making calls to meet the claims against the company. Upon the whole, however painful it may be, we can only, in the discharge of the duty imposed upon us by the legislature, make this rule absolute. Rule absolute.

*88] *WARDE *v.* STUART and Another. *Nov.* 4.

A. entered into a contract with B., to proceed to the coast of Africa, and there procure and ship for B. in England, palm-oil and other produce,—A. to receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the *dry* merchantable palm-oil received by B.: the agreement further provided that A. should not be entitled to any commission on "any *wet*, dirty, or unmerchantable palm-oil" that might be received:—Held, that A. was entitled to no commission in respect of palm-oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price.

THIS was an action for money payable by the defendants to the plaintiff for work done by the plaintiff for the defendants, at their request, and for commission due and payable by the defendants to the plaintiff in respect thereof, and for money received by the defendants for the use of the plaintiff, and for interest upon and for the forbearance by the plaintiff to the defendants, at their request, of divers sums of money due and owing from the defendants to the plaintiff, and for money found to be due from the defendants to the plaintiff on divers accounts stated between them. Claim 5000*l.*

The defendants pleaded,—first, except as to 1975*l.*, parcel of the plaintiff's claim, never indebted,—secondly, except as aforesaid, that the plaintiff's claim, except as aforesaid, was before suit satisfied and discharged by payment,—thirdly, except as aforesaid, a set-off for money payable by the plaintiff to the defendants for money paid by the defendants to the plaintiff's use, at his request, and for money had and received by him to their use, and for the insurance by the defendants for the plaintiff, at his request, of certain large amounts on commission and property of the plaintiff's against loss by perils of the seas and otherwise, and for interest upon the forbearance by the defendants to the plaintiff, at his request, of moneys due from the plaintiff to the defendants on accounts stated between them,—fourthly, as to the 1975*l.*, parcel of the plaintiff's claim, payment into court.

*89] The plaintiff took and joined issue upon the first three *pleas, and replied to the fourth by accepting the 1975*l.* in satisfaction of his claim pro tanto.

The cause was tried before Bramwell, B., at the last assizes at Liverpool. The facts were as follows:—The plaintiff had been for some years engaged as a factor or agent in the African coasting trade. The defendants, Messrs. Stuart & Douglas, are merchants at Liverpool largely engaged in the African trade. In the year 1853, the plaintiff proceeded to Africa in the capacity of supercargo or agent for the defendants, for the purpose of procuring goods by way of barter, upon the terms contained in the following agreement:—

"Agreement made and entered into this 19th day of September, 1853, between Peter Stuart and Peter Douglas, both of Liverpool, in the county of Lancaster, merchants and copartners, of the one part, and John Angus Warde, of Liverpool aforesaid, agent and supercargo, of the other part, as follows:—

"1. That the said John Angus Warde shall go out to the river Bonny, on the west coast of Africa, in such vessel as the said Peter Stuart and Peter Douglas shall as soon as practicable appoint, and there remain in the service and as the agent of the said Peter Stuart and Peter Douglas, or the survivor of them, for the purposes of the adventures in which the said copartners are and shall be interested, and take charge of, discharge, reload, and despatch all such vessels, and sell, barter, and dispose of all such articles, goods and merchandises as the said Peter Stuart and Peter Douglas shall transmit and consign to him for those purposes, and shall purchase or procure in exchange for such articles, goods, and merchandise, the utmost quantity of specie, palm-oil, ivory, or other African produce that he can obtain, and shall from time to time, with the least possible delay, ship and transmit the same to the said Peter Stuart and Peter Douglas, and the survivor of them, in Liverpool *aforesaid, or other port or ports as ordered, [*90 in and on board such ships or vessels as they or he may consign to him as aforesaid.

"2. That the said John Angus Warde shall remain in the river Bonny aforesaid as such agent of the said Peter Stuart and Peter Douglas until he shall have purchased about eleven hundred tons, more or less, of palm-oil.

"3. That should the said John Angus Warde, from sickness or any other cause, be rendered incapable of attending to his duties, he is, in the absence of any instructions from the said Peter Stuart and Peter Douglas, to appoint such persons as he may think most competent to take his place.

"4. That the said John Angus Warde shall sign the bills of lading, inventories, or other accounts for all articles, goods, wares, and merchandise that may be transmitted to him by the said Peter Stuart and Peter Douglas, or the survivor of them, in acknowledgment of his having received the same articles, immediately on receipt of each vessel, and shall return such bills of lading or inventories in original

and duplicate to them by the master of each vessel bringing such consignment, and also by the first eligible opportunity that may present itself after such arrival outwards.

"5. That, in the event of there being any deficiency in the goods, wares, things, and merchandise purporting by any such bills of lading or inventories to have been consigned to him the said John Angus Warde, he shall immediately note the particulars of such deficiency upon such bill of lading or inventory, in the presence of the master or mate or other two senior officers for the time being of the vessel by which such things shall purport to have been consigned; and, in the event of the said John Angus Warde in any instance failing or neglecting to make such note in such presence, or of his *failing to return such bills of lading or inventories in original and duplicate as aforesaid, *91] he shall in every instance of such omission be deemed and taken to have received the whole of the goods and merchandise mentioned in such bills of lading or inventories, and shall account for or make good the whole thereof to the said Peter Stuart and Peter Douglas, or the survivor of them, and the cost thereof be made a set-off against his commission.

"6. That the said John Angus Warde shall from time to time and at all times during his stay on the coast of Africa under and in pursuance of this agreement, obey and follow such instructions as may be forwarded to him by the said Peter Stuart and Peter Douglas, or either of them, by letter.

"7. That the said John Angus Warde shall whilst on the coast of Africa exclusively devote the whole of his time and attention to the business and employment of the said Peter Stuart and Peter Douglas, or the survivor of them, and shall not engage in any other business, speculation, or employment whatever, either by or for himself or for or with any other person or persons whomsoever, or allow any person or persons under his command to trade for themselves or for account of any other person or persons than the said Peter Stuart and Peter Douglas.

"8. That the said Peter Stuart and Peter Douglas and the survivor of them shall allow and pay to the said John Angus Warde, as a remuneration for his services, a commission of 6*l.* sterling per cent. on the net proceeds of the dry merchantable palm-oil or other African produce received by the said Peter Stuart and Peter Douglas, such commission to become due when the said proceeds have been received in cash, making the usual deductions in accordance with the rules and regulations of the Liverpool African Association.

"9. That the said John Angus Warde shall not be *entitled to any commission or other remuneration whatever on any such *92] specie, palm-oil, or other African produce that may be bartered for or purchased by him as aforesaid, but which from loss of ship or otherwise,

shall not be actually received in Great Britain, or *on any wet, dirty, or unmerchantable palm-oil that may be received;* and it being further expressly understood and agreed that the said Peter Stuart and Peter Douglas shall have an absolute lien and charge on all such commissions for any deficiency in goods, wares, or merchandise belonging to them that may come into the possession of the said John Angus Warde and that he may fail to account for as aforesaid, and shall be entitled to retain, set-off, and deduct the amount or value thereof out of any such commissions prior to paying over or accounting for the same to the said John Angus Ward.

"10. And it is further understood and agreed, that all debts, sum and sums of money, claims, and demands which he the said John Angus Warde shall or may have or claim to have under or by virtue of this agreement or otherwise, shall be entirely discharged and extinguished by such set-off and retainer, to the extent of the claims, liens, charges, and cross-demands of the said Peter Stuart and Peter Douglas, or the survivor of them, so set off and retained.

"11. That, if the said John Angus Warde shall neglect or fail in the performance or observance of all or any of the provisions, stipulations, and agreements hereinbefore on his part engaged and agreed to be observed, done, and performed, then and in any and every such case the said John Angus Warde shall forfeit and pay for each breach to the said Peter Stuart and Peter Douglas, or the survivor of them, the sum of 100*l.* sterling as liquidated damages for every such breach, neglect, or non-performance, over and above paying to them any loss or damage they may sustain thereby, and making good to *them the amount in value of the deficiency of any goods or merchandise belonging to them that may come into his hands as aforesaid. [*93

"12. It is also further agreed upon and understood, that the said John Angus Warde shall pay to the said Peter Stuart and Peter Douglas, or the survivor of them, out of any commissions, wages, or emoluments that may become due to him and payable by the said Peter Stuart and Peter Douglas, the sum of 5*l.* sterling per month as part payment of the wages of each and every captain or sailing master that may take out vessels consigned to him by the said Peter Stuart and Peter Douglas as aforesaid."

The plaintiff brought home a large quantity of palm-oil and other produce; but, inasmuch as some of the palm-oil contained small quantities of water, and was on that account sold subject to an allowance varying from 6*d.* to 1*s.* and 1*s.* 6*d* per cwt. (on a selling price of from 48*l.* to 48*l.* 15*s.* per ton), the defendants insisted that the plaintiff was by the terms of the eighth and ninth articles of the agreement disentitled to commission. And a broker was called, who stated that palm-oil was considered in the market to be "wet" if it contained any portion of water, however minute; but all the witnesses admitted that the pre-

sence of so small a quantity of water as was proved here did not render the oil unmerchantable.

The learned judge left the case to the jury upon the evidence; telling them, that, according to the true construction of the contract, in order to disentitle the plaintiff to his commission, the oil must be *sensibly* wet.

A verdict was found for the defendants; and leave was reserved to the plaintiff "to move to enter a verdict for him, on the ground that, though the oil was wet or dirty, still, as it was merchantable, though subject to allowance, the plaintiff was entitled to commission in *respect of it. If the rule were made absolute, Mr. B. (a merchant) to certify the amount for which the verdict was to stand. If a rule nisi were refused, or discharged, then the verdict to be subject to Mr. B.'s certificate, who was to have power to take the accounts on the principle that the plaintiff was not entitled to commission on oil on which allowances had been made. If he found any balance due on the account over the money paid into court, the verdict was to be entered for the plaintiff for that amount. The defendants not to claim anything but admitted items of set-off."

*94]

Hugh Hill, Q. C. (with whom was *Quain*), now moved to enter a verdict for the plaintiff pursuant to the leave reserved.—He submitted that, according to the true construction of the agreement, the plaintiff was to lose his commission only in the event of the oil being so wet or dirty as to be unmerchantable; and that the parties never could have contemplated that the defendants should have the plaintiff's services for nothing by reason of so small an amount of wetness as to justify a reduction or allowance to the extent of one and a half or two per cent. only.

CRESSWELL, J.—I see no reason to find fault with the construction which my Brother Bramwell put upon the contract. The parties seem to have taken great pains to express themselves with clearness and accuracy. They first say, in article 8, that the plaintiff shall receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the *dry* merchantable palm-oil received by the defendants: and then they proceed to say that he shall not be entitled to any commission on "any wet, dirty, or unmerchantable palm-oil that may be received." Now, the evidence showed that the oil in question was, according to the understanding of *the trade, "wet" palm-oil. The terms of the contract, therefore, expressly disentitled the plaintiff to any commission. The rule must be refused.

*95]

CROWDER, J., and WILLES, J., concurring, Rule refused.

PRIOR and Another *v.* WILSON. *Nov.* 5.

The defendant published of the plaintiffs, coal-merchants, what purported to be a report of an inquiry before a board of guardians respecting the fraudulent conduct of the plaintiffs' agent, who, in performance of a contract for "best coals," had delivered at the workhouse coals of an inferior description, and (by falsifying the weighing-machine by means of a wedge) deficient in weight.

The libel commenced, "The way in which Messrs. P. (the plaintiffs) do things at Guildford. Inserting the wedge:" and ended with a recommendation of one of the guardians to "have nothing more to do with Messrs. P.,"—innuendo, "the defendant meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently."

The defendant pleaded a justification, following the innuendo, and saying that the coals delivered, as mentioned in the libel, were inferior in quality, *as the plaintiffs well knew*, and deficient in weight.

The judge ruled, that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it; and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shown some complicity on their part in the misconduct and fraud imputed to their agent.

The jury having found for the plaintiffs,—Held, that there was no misdirection, and that the libel imputed *personal* misconduct and fraud to the plaintiffs.

THIS was an action for a libel published of the plaintiffs in the way of their trade.

The declaration stated that the plaintiffs are, and were at the time of the publishing of the libel thereinafter mentioned, coal merchants in partnership together, and carrying on an extensive trade as coal merchants in England, and, among other places, at Guildford, in the county of Surrey, and, shortly before the publishing of the libel thereinafter mentioned, one William Smart had been their agent at Guildford in the said trade, and had entered into a contract as such agent with the board of guardians of the poor of the Guildford union for the supply to the said board of coals, and the said board had complained of the mode in which, both with respect to the quantity and quality of the coals, the said William *Smart had begun to carry out the said contract; [*96
and a meeting of the said board had been held, to inquire into these complaints, at which meeting the governor of the union workhouse and several witnesses attended; and thereupon the defendant, referring to the matters hereinbefore mentioned, falsely and maliciously printed and published of the plaintiffs in their said trade the words following, that is to say,—"Guildford Coal Contract. *The way in which Messrs. Prior* (meaning the plaintiffs) *do things at Guildford!!* Copied in extenso from the West Surrey Times, January 12th, 1856. The coal contract. *Inserting the wedge.* The clerk read the copy of a note which he had sent by order of the board to Messrs. Prior, who were under contract to supply the union with thirty tons of the best coal, at 24*s.* 6*d.* per ton, complaining that the coals sent were inferior in quality and deficient in quantity, and they were to supply no more. A reply from Messrs. Prior was also read, in which they promised to investigate

the matter, complaining that a firm of their standing in the coal trade should have been addressed in the terms in which the clerk addressed them. (Laughter.) A second communication was also read, from Messrs. Prior, containing a long letter from Mr. Smart (their agent at Guildford), explanatory of the matter. Mr. Smart asserted that 'First quality Derby Bright Coals' had been ordered, and these were supplied; and, in the matter of deficiency in quantity, so opposite was the fact, that, on two occasions, they had been obliged to take coals back again; and, in one instance, in two tons sent, as much as 1 cwt. was returned as overweight. The guardians must have known, continued Mr. Smart, that the best sea-borne coals could not be purchased at 24*s.* 6*d.* per ton; and he would undertake to prove that the union had not for a long time past been supplied with sea-borne coals. He had the machine
*97] examined by Superintendent Parr *and a gentleman named Filmer; and he admitted there was some mystery in the action of the scales. Messrs. Prior stated that they had directed Mr. Smart to attend before the guardians and explain the matter. At the suggestion of the guardians, the contract was read: the words were 'best coals;' and not a word occurred about 'best quality Derby Bright' in it. Several guardians said that the best coals were sea-borne coals. The clerk said that it was the first time that 'first quality Derby Brights' had been introduced to the board, and perhaps it would be better in future to mention the sort of coals. The chairman inquired if there was any report from Mr. Parr to the board. It was ascertained that none had been received. The governor was then called in; and, in answer to questions, stated that he believed the inspector of weights and measures had attended at the union and examined the machine of Messrs. Prior and that belonging to the union, but he was not present at the time.

"The porter, on being called, stated that he was present when the machines were examined; they differed considerably; and his opinion was that Messrs. Priors' machine was wrong, and the union one was right. He had every reason to believe that Messrs. Priors' machine then produced was the same that was brought with the coals the week previously. He had noticed the wooden wedge placed under the lever of the machine the week before; and, seeing it was not there when the inspector was examining it, he asked where it was then. Mr. Smart asked his man, and he said it was at the coal-pens.

"By *Major Onslow.* When the wedge was inserted, it prevented the scale going down.

"*The Chairman.* Then you think this wedge was put there to prevent the lever from acting freely?

"*The Porter.* I think so.

*98] *"*Major Onslow.* Do you think that Mr. Smart knew of this wedge being inserted?

"*The Porter.* I do not know. When the wedge was not there, the

coals weighed the same on both machines. It was the opinion that the machines were both right when the wedge was not there.

"*The Chairman.* Were some of the coals sent in at first overweight?

"*The Governor.* By their machine: we had no machine then; and they did take some coals away.

"*The Chairman.* With regard to the quality of the coals?

"*The Governor.* They burn very fast, and reduce to a white ash. We shall require a larger quantity of them.

"*The Chairman.* Do you think you have had sea-borne coals under former contracts?

"*The Governor.* I believe we have.

"*The Chairman.* Are you sure of that?

"*The Governor.* I should not like to swear that we had: but we never had this sort before.

"*Mr. Drury.* Do they send tickets with the coals?

"*The Governor.* Yes. The first ticket described the coals as 'best Derby Bright.' We complained about that; and then the succeeding tickets were altered to 'best.'

"*The Chairman.* Did you complain of the coals the first time they came?

"*The Governor.* I said that they were not the same sort of coals that we had been having.

"The porter stated that the same difference existed between the machines, viz. 7lbs., when weighing empty sacks, as there did when full ones were weighed. Every empty sack weighed 14lbs. on their machine, and 7lbs. on the union one.

"*Major Onslow.* Was the wedge under then?

*"*The Porter.* Yes. [*99

"*Mr. Strong.* That made the 7lbs.

"*The Chairman.* Is it your opinion that the union has been supplied with sea-borne coals before this?

"*The Porter.* To the best of my belief we have. The moment these came in, I said they were not the right coals.

"The Chairman observed that Mr. Smart wrote to the firm, and said that he had just got an order to supply thirty tons of the 'first quality Derby Bright coal' to the Guildford union.

"Mr. Strong said that 24*s.* 6*d.* was a long price for Derbyshire coals: he could get them delivered at Woking for 15*s.*: not the best sort.

"The Chairman stated that similar coals as the 'Derby Bright' were to be purchased for 21*s.* a ton.

"Mr. Drury stated that it was unfair to other persons who had sent in tenders, for Mr. Smart to supply an inferior description of coals; because no doubt the other merchants had entered their prices calculating that the coals were to be the best coals. One of the merchants

had said to him, that he could not understand how Messrs. Prior could supply best coals at 24*s.* 6*d.* per ton.

"The Chairman inquired if they would have Mr. Smart in, and hear his statement.

"Mr. Drury would like to have the matter of the wedge explained.

"Mr. Smart was then called in, and

"The Chairman detailed what information had been given to the board relative to the use of the wedge, and suggested an explanation.

"Mr. Smart then informed the board of the description of machine he used; that it dropped below the proper level, which it should not do; and, in order that it should not have so much play, he at first had an iron hoop made to prevent this. The hoop was broken, and *a wedge was put in, at the suggestion of the governor and the porter of the house. The man who brought the coals should come before the board, and tell them what he knew about the matter. The insertion of the wedge could not make any difference. He admitted that there was a difference of 7lbs. in the machines. He could assure the board that this was a mystery to him, and he should be thankful if they would help him to solve the difficulty. He had been informed, that, if a tall man put the coals on the machine, they went further over the scale, and the leverage was altered, and the difference in weighing would amount to 5lbs., 6lbs., or 7lbs.

*100]

"*The Chairman.* The same difference appears in weighing empty sacks.

"*Mr. Smart.* That is positively false; and Mr. Ames cannot deny it. When I left the union, on the Saturday referred to, I did so quite free from any knowledge of wrong being attempted. I was under the impression that there was some mystery in the matter, and went to Captain Hastings to get the machine tested. He (Captain H.) referred me to Mr. Parr, and to him I also went; but Mr. Parr said, that, as the machine was in the borough, he could not act. I then went to Mr. Wickers, who informed me, that, although he was gazetted as inspector of weights and measures for Guildford, he had no apparatus for testing the machine. In this dilemma, I went to Mr. Filmer, a gentleman of high standing, who tested the machine; and, though there had been some mystery in its action, it made no material difference. I think the machine must have had some dust in it.

"*Mr. Strong.* That would not make a quarter of a pound difference.

"*The Chairman.* It would not differ 7lbs. in consequence.

"*Mr. Smart.* I am told it would.

"The porter and governor were then recalled.

*"*The Chairman.* You informed the board that there was 7lbs. difference in an empty sack weighed on both machines?

*101]

"The porter reiterated his former statement.

"*Mr. Smart.* That is positively false.

"*The Chairman.* You also know about the wedge. Did you or the governor order that to be made?

"The porter and governor both replied in the negative.

"Mr. Smart said his man had told him it was the case.

"The porter said, that, noticing the wedge was not in the machine as formerly, he did ask where it was. This was in the absence of the governor.

"*The Chairman* (to Mr. Smart). You say in your letter that you had received an order for thirty tons of 'first quality Derby Bright.' It appears that you received no such order; the contract only said 'best coals.'

"Mr. Smart inquired what sort the board required.

"*The Chairman.* If you had 'best coals' ordered, should you not invariably send sea-borne coals?

"*Mr. Smart.* Not invariably.

"*The Chairman.* The board have made up their minds that the best coals are sea-borne coals, and also that they have in former contracts been supplied with sea-borne coals.

"*Mr. Smart.* No.

"*The Chairman.* The opinion of the board is, that 24*s.* 6*d.* is an extravagant price for Derby coals.

"*Mr. Smart.* Any member of the board must know, that, as sea-borne coals cannot be supplied in London for less than that sum, they could not be supplied at Guildford for that sum.

"*The Chairman.* We have nothing to do with that. We have only to look to the figures in the tenders. You tell your firm that 'Derby Brights' are ordered, when our contract does not mention that sort.

*"*Mr. Smart.* Showing the conviction on my mind at the time. [*102

"*Major Onslow.* Do you call the 'Derby Brights' the best coals?

"*Mr. Smart.* Yes, I do.

"*Major Onslow.* The very best?

"*Mr. Smart.* Yes.

"*Major Onslow.* Then, as a guardian, I beg to differ with you.

"Mr. Smart then retired, and sent in his man, who had brought the last coals to the union.

"Charles Adey stated that he was a servant of Messrs. Prior. He had brought some best inland coals to the union, and weighed them in the presence of the porter. He knew about the wedge. It was because the beam had too much play. He did not bring the wedge on this occasion: it was in the yard of the house.

"*The Governor.* Who cut it?

"*Adey.* Daniels; on the tub.

"*The Porter.* Did you take the wedge away?

"*Adey.* Yes.

"*The Chairman.* Where is the wedge now?

"*Adey.* On the platform at the station.

"*Major Onslow.* Why was it left there?

"*Adey.* Because Filmer said it was not wanted.

"*Major Onslow.* Who is Daniels?

"*Adey.* One of Messrs. Priors' carmen.

"*By the Chairman.* I did not tell Mr. Smart that the officers of the house had the wedge put in.

"*The Chairman* (to the Governor). Could that wedge have been made in the yard without your knowledge?

"*The Governor.* Yes.

"*Mr. Drury.* Suppose you carry coals elsewhere, would you take the wedge?

"*Adey.* Yes, sir.

*103] *"*Mr. Elwin.* What difference would that make in weighing?

"*Adey.* I do not know.

"*Mr. Strong.* Why was it put there at all?

"*Adey.* Because some people said the beam had too much play.

"The chairman then asked about the empty sacks weighing 7lbs. less on one machine than on the other. He denied, at first, that it was so: but, when the porter repeated the question, the man admitted the fact.

"This concluded the examination; and Adey withdrew.

"Major Onslow asked if the board was not competent to throw up the contract.

"*The Clerk.* That has already been done.

"Major Onslow said he was not at all satisfied with the explanation that had been given.

"The Chairman said, that, under the contract, Messrs. Prior ought to have furnished the best coals; yet he thought in future the sort of coals should be named. They had a public duty to perform, as much to the tradesmen of the neighbourhood as to the rate-payers. He thought the board was entitled to compensation from Messrs. Prior for their breach of contract.

"Mr. Strong had no doubt they could recover compensation by going to law: but he thought the best plan was, to let the matter end there, and have nothing more to do with Messrs. Prior.

"The board confirmed their previous decision (to throw up the contract), and ordered that fresh forms of tender should be sent to all the coal merchants except Messrs. Prior.

"Mr. Smart was then called in, and informed of the decision of the board.

"Finding that Mr. Smart was about to enter into a lengthened state-

*104] ment, the guardians stopped him. Some *amusement was caused by the importunate requests made by Mr. Smart that the board would test his machine again.

"The board declined to have anything further to do in the matter, and went on with other business,"—the defendant meaning thereby, *that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently.* And the plaintiffs claimed 500*l.*

The defendant pleaded,—first, not guilty,—secondly, as to the printing and publishing the said words, that, before the committing of the grievances in the declaration mentioned, and before and at the several times of the happening of the matters and things mentioned and referred to in and by the words in the declaration alleged to have been printed and published, that the plaintiffs carried on the business of coal merchants at Guildford and other places, their said business of coal merchants at Guildford being conducted and managed by William Smart, being the same person as in the said words was mentioned as Mr. Smart: That, whilst the plaintiffs so carried on the said business at Guildford, they the plaintiffs, by the said William Smart, their agent in that behalf, made a contract in writing with the board of guardians of the poor of the said Guildford union in the declaration mentioned, whereby the said plaintiffs agreed to sell and deliver to the said guardians at the workhouse of the said union thirty tons of coal in the said contract described as best coals, at the price of 24*s.* 6*d.* per ton: That, in part performance of the said contract, the plaintiffs, on divers occasions before the committing of the said grievances, delivered at the said workhouse for the said guardians coals of a sort called Derby Brights, *as the plaintiffs well knew:* That, at the time of the *making of the said contract, and from thence thitherto, coals brought by sea from Newcastle [*105 and other places on the coast of Northumberland and Durham were and are coals commonly called and known by the name of best coals, and which said best coals were and are superior in quality and of greater price than a certain other sort of coals called and known by the name of Derby Brights, *as the plaintiffs well knew:* nevertheless, the plaintiffs directed their said agent the said William Smart to represent and pretend to persons proposing to buy and buying coals from the plaintiffs through the said William Smart, that the said coals called or known by the name of Derby Brights were better in size and quality than coals brought from Newcastle aforesaid: That, in part performance of the said contract, the plaintiffs, and the said William Smart, as their agent, relying on the directions aforesaid, afterwards, on divers occasions before the committing of the said grievances, delivered at the said workhouse for the said guardians coals of the said sort called Derby Brights, instead of and not being best coals, and being of an inferior quality and less price than best coals, *as the plaintiffs well knew:* That, on the occasions on which the said coals were delivered at the said workhouse as aforesaid, the plaintiffs sent with the said coals a weighing-machine

for the purpose of therewith weighing the said coals; and that, in weighing the said coals with the said machine on the occasions of their being so delivered as aforesaid, a wooden wedge was by the servants of the plaintiffs placed under the lever of the said machine, which prevented the said lever from acting freely: That coals weighed in the said machine when the said wedge was so placed under the said lever thereof, appeared to weigh more than the same coals appeared to weigh in the said machine when the said wedge was not so placed under the said lever thereof, and more than the true weight thereof: That, on the first occasion when

*106] *the plaintiffs so as aforesaid delivered at the said workhouse for the said guardians a part of the said coals so contracted for as aforesaid, the said coals sent were weighed by the said machine of the plaintiffs with the said wedge placed under the said lever thereof; and that it then appeared by such weighing that more coals had been brought to the said workhouse in the wagons of the plaintiffs than was sufficient to make up the quantity of coals on that occasion to be delivered; whereupon a part of the coals so brought was carried back in the said wagons, and the residue thereof only was delivered at the said workhouse; and the said residue was in fact deficient in quantity: That, after the said first occasion when the plaintiffs so as aforesaid delivered at the said workhouse for the said guardians part of the said coals so contracted for as aforesaid, the said guardians, being possessed of a machine for the weighing of coals, certain sacks full of coal, and certain empty sacks, were weighed in the said machine of the said guardians, and the same were also weighed in the same machine of the plaintiffs without the said wedge being placed under the said lever thereof, when the said sacks full of coal and empty sacks appeared according to both of the said machines to be of the same weight; but that sacks, whether filled with coals or empty, being weighed in the said machine of the plaintiffs when the said wedge was placed under the said lever thereof as aforesaid, appeared to weigh more, to wit, 7lbs. more, than the same sacks filled with coals, or the said empty sacks, appeared to weigh when weighed in the said machine of the said guardians: That, afterwards, and before the committing of the grievances in the declaration, a meeting of the said guardians was held at the said workhouse, which was attended by the then chairman of the said guardians, and also, among other of the said guardians, by Major Onslow, Mr. Drury, Mr. Strong,

*107] and Mr. Elwin, respectively mentioned in *the said words so printed and published, and there were present at the said meeting the said William Smart, and the governor of the said workhouse, and the porter of the said workhouse: And that, at the said meeting, the several letters were read, and the several questions were asked, and the several answers thereto were given, and the said statements were made, which were mentioned in the said words in the declaration alleged to have been printed and published by the defendant, and which said words

so printed and published contained and were a true report and account of all that was said or done at the said meeting; and the matters and things therein contained of and concerning the plaintiffs, and of and concerning them in their said trade, were and are true.

The plaintiffs took issue upon both these pleas.(*a*)

*The cause was tried before Willes, J., at the sittings in London after last Trinity Term. [*108

It appeared that the plaintiffs and the defendant were rival coal merchants. On the part of the defendant, it was submitted, that the libel did not impute personal misconduct to the plaintiffs, but only to their agent; and that, although the innuendo stated that the defendant meant to impute to the plaintiffs that they had sanctioned the fraudulent and improper conduct of their agent, and the defendant by his plea of justification adopted that construction of the libel, still he was not bound to prove it.

The learned judge, however, ruled that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it: and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shown some complicity on their part in the misconduct and fraud imputed to their agent.

The jury returned a verdict for the plaintiffs, damages 40*s*.

Byles, Serjt. (with whom was *Collier*, Q. C., and *Unthank*), now moved for a new trial, on the ground of misdirection.—The question is, whether the libel imputes personal misconduct to the plaintiffs, or only imputes fraud and misconduct to their agent, and whether the record is so framed that it was necessary for the defendant, in order to support his justification, to prove that the plaintiffs were cognisant of and sanctioned the alleged fraud. The innuendo is, "meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently." The defendant by his plea follows the innuendo, and says that the coals

(*a*) The plaintiffs also demurred to the second plea, alleging for cause "that the plea, although it did not deny that the libel was published in the sense attributed to it by the declaration, does not show any facts which justify the publication of it in that sense; for, it does not show that the plaintiffs were cognisant of and had sanctioned the improper and fraudulent conduct of their agent at Guildford which is mentioned in the libel, and that they were accustomed to carry on their trade there improperly and fraudulently."

The defendant joined in demurrer, the points marked for argument on his part being,—"1. That the second plea is good, inasmuch as it shows that the statements made in the alleged libel are true. 2. That the alleged libel on the face of it shows that no fraud of which the plaintiffs were personally cognisant is imputed to them. 3. That, notwithstanding the 61st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the plaintiffs cannot enlarge the sense of a written libel like that declared on and set out verbatim. 4. That the plea affects to justify merely the printing, &c., of the very words used, and does not justify the sense imputed, supposing that, in a case like the present, such sense can by innuendo be carried beyond the meaning of the words themselves."

*109] delivered, as *mentioned in the libel, were inferior in quality, *as the plaintiffs well knew*, and deficient in weight. The real issue is, does the alleged libel state, or by fair inference imply, that the Messrs. Prior were personally guilty of fraud in the transaction, or cognisant of and participant in the fraud of their agent. Since the Common Law Procedure Act,(*a*) it is not necessary to prove the whole plea.

CRESSWELL, J.—I cannot entertain the slightest doubt that the libel in question does impute to the plaintiffs complicity with their agent,—personal misconduct and fraud. It begins with these words "The way in which Messrs. Prior do things at Guildford! !" and ends with a recommendation of one of the guardians to "have nothing more to do with Messrs. Prior."

WILLES, J.—I thought the defendant was very fortunate to have a verdict against him for 40*s.* only. Rule refused.

(*a*) See 15 & 16 Vict. c. 76, ss. 61, 76, 77.

*110] *ATWOOD and Others *v.* EMERY. *Nov.* 7.

A contract by a manufacturer to furnish certain specified goods "as soon as possible," means, within *a reasonable time*, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand.

THIS was an action for not accepting and paying for goods contracted for.

The first count of the declaration stated, that it was agreed by and between the plaintiffs and defendant, that the plaintiffs should *as soon as possible* send to the defendant, at the Cooperage, Blackwall, 350 bundles of iron hoops, each bundle to contain twenty-four hoops of certain sizes specified in the order for the said hoops, dated the 30th of November, 1855, also 200 bundles of iron hoops, each bundle to contain forty-eight hoops of certain sizes specified in the said order, and each of the said 550 bundles to be firmly tied with rope-yarn: and that the defendant should accept the said bundles of hoops, and pay the plaintiffs for the same so much as they should be reasonably worth. Averment, that the plaintiffs did all things necessary for them to do, and were ready and willing to do all things necessary for them to be ready and willing to do, to entitle them to have the agreed bundles of iron hoops accepted and paid for by the defendant as agreed, and that the time for doing so elapsed before this suit: Breach, that the defendant made default in accepting and paying for the said hoops as agreed, and would not accept the same, or any part thereof; whereby the plaintiffs not only lost all the benefits and profits which would have accrued to them from the performance of the said agreement, but were put to great trouble, costs,

and damages, and did much work, and consumed much time of their servants in and about sending the said hoops according to the said agreement, and taking the same away from the said cooperage, and storing and keeping the same, when *refused by the defendant, and used and occupied much valuable store-room in so storing and keeping the same. [*111

The declaration also contained counts for work done and materials provided, goods sold and delivered, goods bargained and sold, interest, and money due on accounts stated.

The defendant pleaded,—first, to the first count, that it was not agreed by or between the plaintiffs and defendant in manner and form as in that count alleged,—secondly, to the first count, that the plaintiffs did not, according to the said agreement in the said first count mentioned in that behalf, *as soon as possible*, according to the true intent and meaning of the same agreement, send to the defendant at the said Cooperage, Blackwall, such bundles of iron hoops as they ought to have sent according to the said agreement in that behalf, or any part thereof, nor were they ready and willing so to do,—thirdly, to the residue of the declaration, never indebted. Upon these pleas the plaintiffs joined issue.

The cause was tried before Willes, J., at the sittings at Westminster after the last term. The facts were as follows:—The plaintiffs are iron merchants carrying on business under the name of "The Weardale Iron Company," and having extensive works at Darlington and at Ferry Hill, and also a counting-house and place of business at White Lion Wharf, Upper Thames Street, London. The defendant is a cooper carrying on business at Blackwall. In November, 1855, the defendant, having entered into a contract with government for a large number of casks to be furnished within a limited time, called at the plaintiffs' counting-house in Upper Thames Street, and asked the plaintiffs' manager within what time he could execute an order for iron hoops. The manager, referring to a former transaction with them, on which occasion the order had been executed within five weeks, said they would not exceed that time. *Shortly afterwards, viz. on the 30th of November, the defendant instructed his clerk to send to the plaintiffs' counting-house a written order for the quantity of hoops required (about 15 tons), which was done, the letter requesting the plaintiffs to deliver them *as soon as possible*. [*112

On the 7th of January, 1856, the defendant wrote to the plaintiffs' manager, saying that the hoops must be delivered immediately, or he must decline taking them; and, the time for the execution of his contract with the government having expired, the defendant was compelled to obtain the hoops elsewhere, and on the 28th of January he sent them the following letter:—

"Cooperage, Blackwall, Jan. 28, 1856.

"The Weardale Iron Company.

"Agent, Mr. Trowbridge.

"Sir,—In consequence of your not delivering the hoops ordered, according to time, I shall not be able to take them, as I have been obliged to get them elsewhere.

"WILLIAM EMERY."

To this the defendant on the 31st of January received from Trowbridge the following reply:—

"The Weardale Iron Company, White Lion Wharf,
Upper Thames Street, Jan. 30, 1856.

"Mr. W. Emery.

"Dear Sir,—Had your note countermanding your order for hoops arrived before they were made, we would gladly have cancelled it, as we are so full of orders for hoops, it would have been a relief to us; but they are now all made, and at some considerable extra expense. A portion have been forwarded per rail, and, we presume, delivered to you, they having arrived at King's Cross yesterday morning: the remainder will follow immediately.

"For the Weardale Iron Company,
"R. TROWBRIDGE."

*113] *About one third of the hoops were sent by Trowbridge to the defendant's cooperage on the 4th of February, another third on the 10th, and the remainder in the beginning of March; but the defendant declined to receive them, alleging that there had been unreasonable delay.

There was no evidence to show that there had been any undue delay in putting the work in hand: but it was suggested, that, if the plaintiffs had put aside all other business for the purpose of attending to the defendant's order, they might have completed it much sooner than they did.

On the part of the plaintiffs, it was insisted that they were by the terms of the contract only bound to deliver the hoops within a reasonable time, regard being had to the means they had of executing the order, and the quantity of work they might happen to have in hand.

For the defendant it was submitted, that, "to be delivered *as soon as possible*" meant something more than "within a reasonable time;" and that, to entitle them to recover, the plaintiffs were bound to show that they had used due diligence to complete the order without delay.

The learned judge told the jury that the defendant must be bound by the terms of his written order; that the words "as soon as possible" must be taken with reference to the means of the parties employed, the capacity of their works, and the amount of orders in hand for other persons; and that, in effect, it meant "within a reasonable time." But

he reserved leave to the defendant to enter a verdict if the court should be of opinion either that the plaintiffs were bound to procure the articles elsewhere if they were unable to make them themselves at once, or that they were bound to lay aside every other work in order to proceed to the execution of the particular contract.

The jury returned a verdict for the plaintiffs, damages 75*l.*

**Petersdorff* (with whom was *Byles*, Serjt.) now moved, pursuant to the leave reserved, to enter a verdict for the defendant, [*114 or for a new trial on the ground of misdirection.—The question is, what is the meaning of the words "as soon as possible." The expression is one that is susceptible of several different significations. It might mean one thing as applied to a small manufacturer, and something very different in the case of persons like the plaintiffs, who have a large number of men and numerous mechanical appliances and facilities at their disposal. [CRESSWELL, J.—In general, I should say that "as soon as possible" means no more than "without unreasonable delay."] It clearly must have meant in this case, seeing the purpose for which the goods were wanted, something more prompt than that. [CRESSWELL, J.—Do you contend that the plaintiffs were bound to lay aside all other work in order to proceed at once to execute this contract?] It may be that they were bound to do so, or to decline to receive the order. The defendant was entitled to have his order executed at least with the same amount of despatch that any other manufacturer, with the same means, would have used. The plaintiffs gave no evidence as to what steps were taken on receipt of the order: they should at least have shown that they had made some efforts to execute it within a reasonable time. [WILLES, J.—No evidence was given on either side as to the extent of plaintiffs' works. The agent who received the order proved that he sent it down to the manufactory at once. It was not suggested that the plaintiffs did not make out a primâ facie case.] Suppose a builder were employed to build a house, in terms similar to those used here, would the construction of the contract depend upon the pecuniary capability of the party to furnish materials and labour? Would not the true test be, the time within which similar work could be executed by a person possessing all the ordinary means and appliances and the requisite command of capital?

*CRESSWELL, J.—I am of opinion that there should be no rule in this case. By the terms of the contract tendered to the [*115 plaintiffs' agent, the hoops were to be furnished "as soon as possible." My Brother Willes reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion either that the plaintiffs were bound to procure the goods elsewhere if they were not themselves in a position to execute the order at once, or that the plaintiffs were bound to proceed at once to its execution, laying aside

all other orders they might have. I think neither of these is the true construction of this contract. Mr. *Petersdorff* has argued this case upon an assumption that the plaintiffs' engagement was, to execute the work with more speed than would have been required had the words been "within a reasonable time." If that had been so, the contract must have been very differently framed from that now before us. If the defendant had intended to have the hoops within a limited time, he should have taken care to express himself accordingly. I think this contract means no more than a reasonable time, regard being had to the plaintiffs' facilities and extent of business, and to the contracts they already had in hand.

WILLIAMS, J.—I am of the same opinion. Substantially, the leave reserved, was, to enter a verdict for the defendant if the court should be of opinion that their plaintiffs by their acceptance of the contract bound themselves to execute the order as soon as it could by possibility be executed, and without reference to prior orders. To that view I cannot accede. My Brother Willes in substance told the jury that the plaintiffs were entitled to recover, if they thought the contract had been performed within a reasonable time, regard being had to other orders which they might previously have received. It seems to me that that was perfectly right. The *plaintiffs could not be supposed to be contracting without regard to orders which they had already received, and which were entitled to priority of execution. It might be that the plaintiffs' engagements were such as to protract the performance of the contract beyond all reasonable bounds. That, however, is not suggested here. I must say I think a man is not justified in accepting orders which he knows he will be unable to execute for years, or for a period which a jury could have no difficulty in pronouncing to be unreasonable.

*116]

CROWDER, J.—I also am of opinion that the acceptance of this order in the vague terms in which it was given, only bound the plaintiffs to take care that they were guilty of no unreasonable delay in its execution. It is contended that my Brother Willes misdirected the jury, in referring to the ability of the parties contracting, and not to the general ability of the trade. I think he was quite right. How can it be supposed for a moment that the contracting parties meant the performance of the contract should depend upon anything but what the plaintiffs themselves could do? The words "as soon as possible" clearly meant "as soon as *you* possibly can." Nor can I understand how it can reasonably be suggested that either party contemplated that the plaintiffs were to put aside any other engagement, in order that this particular one should be performed. If the defendant had desired to have the goods by a limited time, he should have taken care to give a more limited order.

WILLES, J.—I concur with the rest of the court in thinking that there should be no rule in this case. The case put by my Brother Williams, of a manufacturer delaying the execution of an order for several years, would amount to a business impossibility.

Rule refused.

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*FINNEY *v.* The Hon. BROWNLOW THOMAS MONTAGUE CECIL, commonly called LORD BROWNLOW CECIL. *Nov.* 7. [*117

To a declaration by an endorsee of a *promissory note* for 1000*l.*, made by the defendant, payable to one *John* Jackson Lee, the defendant pleaded his discharge under the insolvent debtors act 1 & 2 Vict. c. 110. The entry in the defendant's schedule, by which it was sought to support this plea, was,—"*James* Jackson Lee, of, &c., 1000*l.*, the amount of my *bond* given by me to this creditor for 725*l.* money lent," &c. The name of the plaintiff, who claimed as endorsee of the note, did not appear in the schedule at all:—

Held, not a sufficient description of the debt to sustain the plea.

THE declaration stated that the defendant, on the 8th of May, 1849, by his promissory note, now overdue, promised to pay to Mr. *John* Jackson Lee, or order, 1000*l.*, with lawful interest for the same, eight months after date, and the said *John* Jackson Lee endorsed the same to the plaintiff, but the defendant did not pay the same; and the plaintiff also sued the defendant for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded,—first, never indebted,—secondly, that the note was altered in a material part after the making thereof,—thirdly, that theretofore, and before the commencement of this suit, to wit, on the 15th of February, 1854, by a certain order of adjudication then in that behalf made by the county court of Kent holden at Dover, the defendant was duly discharged according to an act of parliament passed in the session of parliament holden in the first and second years of Her present Majesty, intituled, &c. [c. 110], and a certain act passed in the session of parliament holden in the tenth and eleventh years of Her present Majesty, intituled "An act to abolish the court of review in bankruptcy, and to make alterations in the jurisdiction of the courts of bankruptcy and court for relief of insolvent debtors" [c. 102], which said order still remains in force.

Replication, that the defendant was not by the said order in the third plea mentioned discharged according to the said statutes of or from the said causes of action *in the said declaration mentioned, or from any or either of them, as alleged. Issue. [*118

The particulars of demand, delivered pursuant to a judge's order, were as follows:—

	£	s.	d.
"Principal due on a promissory note for 1000*l.*, dated the 8th of May, 1849, made by the defendant in favour of Mr. *John* Jackson Lee, and payable with interest at eight months after date, endorsed to the plaintiff, .	1033	6	8.
"Interest on the said sum of 1033*l.* 6*s.* 8*d.* at 5*l.* per cent. per annum from the 11th of January, 1850, to the 7th of January, 1856, the date of the writ, . . .	309	8	7
"Notarial charges on the dishonour of the said note,	0	8	6
	£1343	3	9

"The plaintiff also claims interest at 5*l.* per cent. per annum on the above sum of 1033*l.* 6*s.* 8*d.* from the date of the writ until the day of payment or judgment. Dated, &c."

The cause was tried before Willes, J., at the sittings in London after last Trinity Term. The evidence as to the second plea failed. In support of the third plea, an extract from the defendant's schedule was put in, in which the debt supposed to represent the claim in this action was entered as follows:—

"Mr. *James* Jackson Lee, solicitor, 45, Regent Square, Gray's Inn Lane, Middlesex, or the said Mr. James Evelyn, Guards Club, Pall Mall, Middlesex." "1000*l.*, the amount of my *bond* given by me to this creditor for 725*l.* money lent by him to me, conditioned for payment of interest thereon at the rate of 5*l.* per cent. until the principal
*119] was paid. Also 375*l.* advanced by this creditor *to me on a bill of exchange for 500*l.*, to which myself and Mr. James Evelyn, creditor 44, were jointly party, he endorsing the same for my accommodation. To further secure the first-named sum, I gave this creditor a policy of assurance for 1000*l.* effected on my life, in (I believe) the Rock Life-Assurance Company, of Bridge Street, Blackfriars, London, as is fully set forth in my special balance-sheet."

The order of adjudication was also put in, from which it appeared that the defendant obtained his discharge on the 15th of February, 1854.

It was also proved that shortly after the note became due, the plaintiff wrote to the defendant demanding payment.

The learned judge directed a verdict for the plaintiff for the amount claimed, viz. 1368*l.*, reserving leave to the defendant to move to enter the verdict for him if the court should be of opinion that the debt in question was sufficiently described in the defendant's schedule.

Byles, Serjt. (with whom was *Lush*), now moved for a rule nisi accordingly.—The question turns upon the 69th and 75th sections of the 1 & 2 Vict. c. 110. By the former the insolvent is required, within fourteen days next after the making of the vesting order, to deliver in to

the court a schedule containing, amongst other things, "a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." And the 75th section provides that the adjudication of the commissioner, adjudging that such prisoner shall be discharged from custody and entitled to the benefit of *the act, shall operate his discharge "as to the several debts and sums of money due or [*120 claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and *as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule* so sworn to as aforesaid." The question is, whether the entry in the schedule is a sufficient description of the note declared on, or a wilfully inaccurate statement, and one calculated to mislead. It cannot be denied that the defendant at one time knew that the note was in the hands of the plaintiff. The mere circumstance of his calling it a bond in the schedule would not matter, if it had remained in the hands of the person named. Nor is the misnomer, "James" for "John," of much importance. But the greater difficulty is the absence of all mention of Finney's name: and even that would not be material, if he knew not nor had the means of knowing that Finney was an endorsee. [CRESSWELL, J.—The instrument is not properly described. Have you any case to warrant the motion?] There is no case precisely in point, or even very near the present. [CROWDER, J.—This clearly is not "a full and true description," within the 69th section.(*a*)] The 69th section does not relate to negotiable securities. [WILLES, J.—This is not "a negotiable security set forth in the schedule," within s. 75.]

Per Curiam.—There is no ground whatever for this motion.

Rule refused.

(*a*) See Hoyles *v.* Blore, 14 M. & W. 387.†

*121] *BARBER v. BROWN and Another. *Nov.* 14.

In 1811, W. L., being possessed of certain premises under leases which would expire at Midsummer, 1854, granted to T. and E., respectively, an annuity of 222*l.* 4*s.* 5*d.* for three lives, to secure which he granted to each of them an underlease of the same premises for forty-three years, if the lives, or the survivor of them, should so long endure.

In 1827, the premises in the annuity-deeds mentioned were assigned to the plaintiff for the residue of the terms granted to W. L., subject to the annuities to T. and E., and to the underleases for securing the same.

In 1825, T. and E. were let into possession of the premises so underlet to them; and, in 1830, the plaintiff became tenant to them of part of the premises at the rent of 550*l.*, payable to them in equal moieties.

T., the last survivor of the cestuis-que-vie in his annuity-deed, died in 1851; and, from the time of his death, down to the time of the expiration of the leases granted to W. L., one W. E., as their agent, applied for and received the rent of 550*l.* from the plaintiff for them and the representative of E., and accounted for a moiety to each of them,—deducting certain payments thereout in respect of ground-rent, rates, taxes, insurance, repairs, and commission:—

Held, that the plaintiff was entitled, in an action for money had and received, to recover back the sums so paid by him under the mistaken impression that the right to receive them still continued,—deducting only the sums paid by the agent in respect of ground-rent, rates, and taxes.

THIS was an action brought to recover back a certain sum alleged by the plaintiff to have been paid by him to the defendants for rent of certain premises after the title of the defendants to the premises had expired.

The declaration was for money received by the defendants to the plaintiff's use. The plaintiff by his particulars of demand claimed a sum of 1650*l.* in respect of six half-yearly payments of 275*l.* each "for rent supposed to be payable to the defendants for certain premises in Thames Street known as Lingham's Warehouses, in the occupation of the plaintiff," between the 1st of November, 1851, and the 30th of May, 1854.

The defendants pleaded,—first, never indebted,—secondly, a set-off for money paid by the defendants for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them,—thirdly, that the debts and claims in the declaration mentioned were at all times due from and existed against, and still were due from and existed against the defendants, jointly with others, and not from or against the defendants alone; and that the *122] plaintiff, *at the commencement of the suit, was and still remained indebted to the defendants and the said others in an amount equal to the plaintiff's claim, for money payable by the plaintiff to the defendants and the said others before the suit, for money paid by them for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them, which amount the defendants and the said others were willing to set off against the plaintiff's claim.

The particulars of the defendants' set-off were as follows:—

				£	s.	d.
"Michaelmas, 1851.						
"To cash paid half-year's ground-rent due Michaelmas to S. Wilkes, Esq., less property-tax				71	7	2
"Ditto, ditto, Byde's trustees, net				71	7	2
"Insurance of the property to Michaelmas, 1852				16	0	0
"Tithe, half-year due Christmas, 1850	12	0	0			
"Michaelmas, 1851	12	0	0			
				24	0	0
"Poor-rates, July, 1851				20	12	6
"Property-tax (Ship Afloat), 4 quarters, March, 1851				1	15	0
"Land-tax, two quarters, September, 1851				11	10	9
"Police-rate, one quarter, Lady Day, 1851	2	0	7½			
"Midsummer, 1851	2	0	7½			
"Michaelmas, 1851	2	0	7½			
"Ward-rate, one year, Christmas, 1850	1	7	1			
				7	8	11½
"Water-rate, two quarters due at Midsummer				0	15	0
"Consolidated rate, 1851	8	2	6			
"Ditto, ditto	8	2	6			
				16	5	0
"Sewer-rate, 1851				5	8	4
"Carpenter's account				0	6	2
"Commission, and stamps				17	19	8
"Lady Day, 1852.						
"To cash, paid half-year's rent due to Byde's trustees				71	7	2
"Ditto, ditto, to J. Wilkes, Esq.				71	7	2
"Rates, as under,—						
"House-tax, 4 quarters, Lady Day, 1852	1	17	6			
"Land-tax, 2 quarters, Lady Day, 1852	11	10	9			
"Sewer-rate, ditto	5	8	4			
"Consolidated-rate, 1852	8	2	6			
"Poor-rate, February, 1852	18	15	0			
"Church-rate, 1851	8	9	8			
"Church-rate, 1852	8	9	8			
"Water-rate, Christmas, 1851	0	15	0			
"Police-rate, Christmas, 1851	2	0	7½			
"Ditto, Lady day, 1852	2	0	7½			
"Ward-rate, 1851	1	7	1			
				68	15	11
"Carpenter, small repairs				0	11	9
"Clarke allowance, 5*s.*; Raymond account, 5*s.* 6*d.*				0	19	6
"Commission, and stamps				18	2	0
"Michaelmas, 1852.						
"To cash paid half-year's ground-rent due Michaelmas to the trustees of Byde (less property-tax)				71	7	2
"Ditto, ditto, J. Wilkes, Esq.				71	7	2
"Rates.						
"Tithe, 2 quarters due Christmas, 1851, 12*l.*; Midsummer, 1852, 12*l.*	24	0	0			
"Police, 1 quarter, Midsummer, 1852	2	0	7½			
1 quarter, Michaelmas, 1852	2	0	7½			
"Consolidated-rate, 1852	12	3	9			
"Poor-rate, August, 1852	16	17	6			
"Water-rate, 2 quarters, Midsummer, 1852	0	15	0			
				57	17	6
"Insurance of the premises to Michaelmas, 1853				16	0	0
"Carpenter, for generally repairing woodwork throughout, 52, Thames Street				2	12	5
"Ditto, ditto				0	16	9
"Commission, and stamps				17	16	9

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				£.	s.	d.	£.	s.	d.
"Lady day, 1853.									
"To cash paid half-year's moiety ground-rent due Lady Day, 1853, to J. Wilkes, Esq. (net)				71	7	2			
"Ditto, ditto, Byde's trustees				71	7	2			
							142	14	4
"Rates, as under,—									
"Property-tax, house, and warehouse, four quarters, Lady Day, 1852		15	8	0					
"Ditto, Lady Day, 1853		15	8	0					
				80	16	0			
"Ditto, Ship Afloat, four quarters, Lady Day, 1852		1	18	8					
"Ditto, Lady Day, 1853		1	18	8					
				3	6	6			
"Tithe, two quarters, Christmas, 1852				12	0	0			
"Water-rate, ditto				0	15	6			
"Land-tax, warehouse, two quarters, Sept., 1852,	9	0	11						
"House	2	9	7						
		11	10	6					
*"Ditto, house and warehouse, two quarters, Lady Day, 1853		11	10	6					
				23	1	0			
"Police, one quarter, Christmas to Lady Day, 1853				2	14	2			
"Church-rate				11	5	0			
"House-tax, four quarters' Lady Day, 1853				1	17	6			
							85	15	2
"Jewson allowance 4*s.* 2*d.*, 5*s.*, Howard ditto, 10*s.* 6*d.*, Raymond account 1*s.* 6*d.*, Bloomfield account 8*s.* 4*d.*							1	4	8
"Buzzard, account, external painting 52, Lower Thames Street							10	18	0
"Smith, account for sundry repairs, and cleaning ditto							5	10	6
"Commission, and stamps							18	9	8
"Michaelmas, 1853.									
"To cash paid half-year's ground-rent due to J. Wilkes, Esq., for moiety of premises (less property-tax)							71	7	2
"Ditto, ditto, Byde's trustees, for remaining moiety (less property-tax)							71	7	2
"Rates, as under,—									
"Poor-rate made September, 1853				16	17	6			
"Tithe, half-year, Midsummer				12	0	0			
"Water, Midsummer				0	15	0			
"Police, one quarter, Lady Day, 1853				2	14	2			
"Ward, one year, 1852				1	7	1			
"Police, one quarter, Midsummer, 1853				2	14	2			
"Ditto, Michaelmas, 1853				1	7	1			
"Property-tax, one year, 1853				2	0	7½			
"Sewer, one year, 1853				2	14	2			
"Consolidated, half-year, 1853				10	16	8			
"Ditto, ditto				9	9	7			
							62	16	0½
"Insurance of the property to Michaelmas, 1854							16	0	0
"Verry, account for printing, &c.							2	5	0
"Nicholson, sundry repairs							5	4	4
"Smith, repairing roof, &c.							1	0	0
"Commission, and stamps							18	1	9
"Lady Day, 1854.									
"To cash, paid one moiety of ground-rent to J. Wilkes, Esq. (less property-tax)							71	7	2
"Ditto, ditto, Byde's trustees							71	7	2

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	£.	s.	d.	£.	s.	d.	£.	s.	d.
"Rates, as under,—									
"Property-tax, 4 quarters, Michaelmas, 1854				15	5	1			
"Poor-rate, September, 1853				16	17	6			
"Ditto, March, 1854				18	15	0			
"Police-rate, Christmas, 1853	2	14	2						
"Ditto, Lady Day, 1854	2	14	2						
"Ward, one quarter, Christmas	1	7	1						
				6	15	5			
*"Land-tax, September, 1853	11	10	8						
"Ditto, Lady Day, 1854	11	10	8						
				23	0	6			
"Church-rate, 1854				8	5	0			
"Tithe, half-year, Christmas, 1853	12	0	0						
"Ditto, one quarter, Lady Day, 1854	6	0	0						
				18	0	0			
"House-tax, four quarters, Lady Day, 1854				1	17	6			
"Water-rate, Christmas, 1853	0	15	0						
"Ditto, Lady Day, 1854	0	7	6						
				1	2	6			
"Sewer, 1854				1	7	1			
"Consolidated, six months, 1854				9	9	7			
							120	15	2
"Property-tax, Ship Afloat, four quarters, Lady Day, 1854							1	15	0
"Raymond, account							0	10	6
"Carpenter's account							0	8	0
"To business account							8	8	0
"To commission, and stamps							18	1	9"

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The cause was tried before Jervis, C. J., at the sittings after Hilary Term, 1856, and a verdict found for the plaintiff for the damages in the declaration, subject to the following case:—

The plaintiff is a warehouse-keeper carrying on business in Lower Thames Street, London. The defendants are executors of John Thackeray, late of Lewisham, deceased.

On the 11th of January, 1811, one William Lingham was possessed under two leases dated respectively the 15th of August, 1794, and 9th of January, 1795, for two certain terms of years, both of which expired at Midsummer, 1854, of certain premises in the city of London, of which certain warehouses called Lingham's Warehouses, formed part; and by indenture of that date, in consideration of the sum of 2000*l.*, he granted to the said John Thackeray an annuity of 222*l.* 4*s.* 5*d.* for the lives of the said John Thackeray, of one Elizabeth *Yarnold, and of one Samuel Thackeray, and for the lives and life of the survivors and survivor of them, payable quarterly, and without any deduction on account of any present or future taxes, charges, or impositions whatsoever except property-tax or income-tax: and, for securing the same, he demised to the said John Thackeray the said premises, including Lingham's Warehouses, for the term of forty-three years from the 10th of January, 1811, if the said John Thackeray, Elizabeth Yarnold, and Samuel Thackeray, or the survivors or survivor of them, should so long live.

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By another indenture, of the 11th of January, 1811, the said William

Lingham, in consideration of another sum of 2000*l.*, granted to one Ralph Ellis another similar annuity of 222*l.* 4*s.* 5*d.* during the lives of the said Ralph Ellis, and his sons Henry Ellis and Ralph Ellis, and the survivors and survivor of them: and, for securing the same, he demised to the said Ralph Ellis the same premises, including Lingham's Warehouses, for the term of forty-three years from the said 10th of January, 1811, if the said Ralph Ellis, and his sons Henry Ellis and Ralph Ellis, or the survivors or survivor of them, should so long live.

By indenture of assignment, bearing date the 14th of March, 1817, the said William Lingham assigned the said premises for the whole residue of his term and interest therein, subject to the said annuities and terms of years for securing the same, to John Kew and William Kew, as a security for a certain debt of 2168*l.* 6*s.* 5*d.* then due from the said William Lingham to the said Messrs. Kew, and interest; and also to secure such further sum and interest, not exceeding 4317*l.* 10*s.* 6*d.* (being the amount which the said John Kew and William Kew were liable to pay to the Bank of England on account of the said William
*127] Lingham), as the said John *Kew and William Kew might pay to the Bank of England for the said William Lingham.

By an agreement in writing bearing date the 10th of May, 1824, made between the said John Kew and William Kew of the one part, and Thomas Lingham, a son of the said William Lingham, of the other part,—reciting that there remained due to the said John Kew and William Kew, upon or by virtue of their said assignment, by the said William Lingham, the sum of 5705*l.* 3*s.* 8*d.*, principal money, with the sum of 1383*l.* 9*s.* 6*d.* for interest on the same, and that the said Thomas Lingham had agreed with the said John Kew and William Kew for the purchase of the said debt of 5705*l.* 3*s.* 8*d.* and all interest then due and thereafter to become due thereon, at the price of 1150*l.*; and reciting that he had paid the sum of 550*l.* in part of the said purchase-money,—the said John Kew and William Kew severally agreed with the said Thomas Lingham, that, on payment of the further sum of 600*l.*, they would, at the costs of the said Thomas Lingham, and by such assurances as he or his counsel should require, assign to him, his executors, administrators, or assigns, the said debt of 5705*l.* 3*s.* 8*d.* and all interest due and to become due in respect thereof, and also the said indenture of the 14th of March, 1817, and all benefit and advantage thereof, and of the trusts therein contained: and the said Thomas Lingham agreed on or before the 1st of July then next to pay the said sum of 600*l.* upon having such assignment executed as thereinbefore agreed.

Messrs. Kew, by deed bearing date the 25th of May, 1824, assigned all their personal estate to George Augustus Lingham, Charles Dixon, and John Abbott, for the benefit of their creditors. They had previously deposited the assignment of Mr. William Lingham's leases with

Messrs. Dixon & Morgan, as a security for a considerable debt owing to them.

*William Lingham died in 1825, having made his will, and thereof appointed his sons, the said Thomas Lingham and [*128 George Augustus Lingham, and his daughter, Sarah Crowley, executors and executrix. Mrs. Crowley renounced probate; and the two sons duly proved the will on the 14th of November, 1825.

On the 3d of December, 1825, Thomas Lingham became bankrupt; and William Simpson was appointed sole assignee of his estate and effects, under a commission of bankruptcy issued against him; and the usual assignment was made to the said William Simpson.

Shortly after the death of William Lingham, and before his will was proved, the ground-rents due from William Lingham in respect of the premises comprised in the annuity-deeds being greatly in arrear, an arrangement was come to for discharging the same, and for other matters, by an agreement bearing date the 25th of October, 1825, between the said John Thackeray and Ralph Ellis, and the said Thomas Lingham, George Augustus Lingham, and one Richard Ellis, of which the following is a copy:—

"In consideration of each of the undersigned John Thackeray and Ralph Ellis having, at the instance and request of us the undersigned Thomas Lingham, George Augustus Lingham, and Richard Ellis, and each and every of us, agreed to advance and pay to Mr. R. Haines as the agent of the ground-landlords of the premises on lease to the late Mr. William Lingham, half (making together the full amount) of the ground-rents due at Michaelmas last, and of one year's insurance to that time,—each moiety amounting to the sum of 342*l.*; and in order to induce each of them the said John Thackeray and Ralph Ellis so to do, we, the said Thomas Lingham, George Augustus Lingham, and Richard Ellis, do hereby jointly and severally engage and undertake with each of them the said John Thackeray and *Ralph Ellis, that the will of the said William Lingham shall be [*129 proved in the Prerogative Court of Canterbury within fourteen days from this time; and that one moiety of the money now due to the estate of the said William Lingham from the commissioners of His Majesty's Customs for rent of part of the said premises, and also one moiety of all other rents now due and hereafter to become due in respect of the said premises, shall in the first instance be applied in payment to each of them the said John Thackeray and Ralph Ellis of his said sum of 342*l.*, with interest thereon, at the rate of 5*l.* per centum per annum, from the date of the advancement thereof by each respectively of them the said John Thackeray and Ralph Ellis; and that the said leasehold premises shall be chargeable with the same sums and interest; and also that both moieties of the residue of the same rents and profits shall in the next place, and after payment of the

ground-rents and taxes payable thereout, be applied in manner following, that is to say, one moiety in payment and discharge of the present arrears of the annuity granted to each of them the said John Thackeray and Ralph Ellis by the said William Lingham, and charged upon the same premises, and all the future and growing payments of the same annuity; and that possession of such parts of the said leasehold premises as are in hand shall this day be delivered to the said John Thackeray, as having the prior legal title to the possession or receipt of the rents of the premises; but all the rents and profits applicable to the payment of the said annuities or either of them shall be applied in payment and discharge of both of the said annuities pari passu, that is to say, by an equal pound-rate: And this undertaking shall be a sufficient authority and consent and direction to and for the tenants of such parts of the said leasehold estates as are in the possession of tenants, for paying
*130] their arrears and future and *growing payments of their rents to the said John Thackeray, to be by him applied for the purposes aforesaid: And also that the costs and charges of the said John Thackeray and Ralph Ellis of and occasioned by the negotiation and attendances upon, and correspondence with, Mr. Broughton, Messrs. Ellis & Co., and Messrs. Sherwood & Son, which have led to this arrangement, and also the costs of this undertaking, and consequential thereon (not exceeding in the whole the sum of 600*l.*), shall be paid and discharged out of the rents and profits of the said leasehold estates, and shall be a charge on the said leasehold estates and the rents and profits thereof; and that, for the purpose of securing the said several sums of 342*l.* and 342*l.*, and the said costs and charges, an underlease or underleases, and not an assignment by way of mortgage, and at a peppercorn-rent, shall, at our costs and charges, be executed to the said John Thackeray and Ralph Ellis respectively, or to a trustee for them and him respectively; but that the sum to be secured to each of them the said John Thackeray and Ralph Ellis for the said sum of 342*l.* and his share of such costs and charges, shall not exceed in the whole the sum of 942*l.*"

In pursuance of the said agreement of the 25th of October, 1825, the said John Thackeray, on or about the date thereof, paid one of the said sums or moieties of 342*l.*, and also the sum of 63*l.* 3*s.* 7½*d.*, being a moiety of the costs and charges mentioned in the said agreement.

By another memorandum, made on the said 25th of October, 1825, the said George Augustus Lingham and Thomas Lingham authorized, empowered, and requested the said John Thackeray and Ralph Ellis to pay to the rector of the parish in which the said premises included in the said annuity securities were situate, certain arrears of tithe due in respect of and chargeable upon the said premises, and agreed that they
*131] might retain what they *should so pay out of any moneys which might come to their or either of their hands under their several securities, from the said late William Lingham, or under the first-mentioned agreement of the 25th of October, 1825.

The said John Thackeray, in pursuance of this request and agreement, paid to the said rector sums amounting to 90*l.* 2*s.* 8*d.*, being a moiety of the said arrears of tithe.

The said Ralph Ellis, in pursuance of the said agreement of the 25th of October, 1825, and memorandum of the said date, made similar payments of other sums or moieties of 342*l.*, 63*l.* 8*s.* 7½*d.*, and 90*l.* 2*s.* 8*d.*, at the same times and on the same accounts as the payments so made by the said John Thackeray.

By an indenture under seal, bearing date the 11th of October, 1826, made between the said George Augustus Lingham and Thomas Lingham, therein described as executors of William Lingham, of the first part, Stover Smith, sole assignee of the estate and effects of the said George Augustus Lingham, under a commission of bankruptcy against him, of the second part, William Simpson, sole assignee of the estate and effects of the said Thomas Lingham under the said commission of bankruptcy against him, of the third part, the said John Thackeray and Ralph Ellis of the fourth part, and Joseph Barber (the plaintiff) of the fifth part,—reciting, amongst other things, that, in pursuance of the said agreement of the 25th of October, 1825, the said John Thackeray and Ralph Ellis had severally paid the said sums of 342*l.* each, and that the said John Thackeray had been duly let into, and had ever since continued in, the possession of such parts of the said leasehold premises as were in hand, and into the receipt of the rents and profits of such parts of the said premises as were tenanted,—the above-named plaintiff became tenant to John Thackeray of a portion of the premises comprised in the annuity-deeds until the 25th of March, 1827, and thenceforth as yearly [*132 *tenant, but so as not to exceed twenty-one years from the date of the deed, and to be determinable by a half-year's notice by the said John Thackeray or the said plaintiff, as therein mentioned, at a yearly rent of 409*l.*: And by the said indenture it was agreed and declared between the said Thomas Lingham, George Augustus Lingham, John Thackeray, and Ralph Ellis, that the said yearly rent of 409*l.* reserved to the said John Thackeray as aforesaid should be paid, applied, and disposed of, in the first place in payment of the ground-rents, and all taxes, rates, tithes, and assessments which should from time to time become due in respect of the premises thereby demised, during the term thereby granted; in the second place, in payment of 150*l.*, and no more, being a sum which the said John Thackeray and Ralph Ellis had agreed might be paid out of the rents and profits of the said premises towards putting the same in repair, and to be applied for that purpose and no other; and lastly, in such payments, and for such purposes, as according to the true intent and meaning of the said agreement bearing date the 25th day of October, 1825, were agreed to be paid. [A copy of this deed accompanied the case.]

By indenture of the 19th of June, 1827, made between Messrs. Kew

of the first part, Messrs. Dixon & Morgan of the second part, George Augustus Lingham, Charles Dixon, and John Abbott, assignees of Messrs. Kew, of the third part, William Simpson, assignee of Thomas Lingham, of the fourth part, Thomas Lingham of the fifth part, and Joseph Barber, the plaintiff, of the sixth part (but which was not executed by the said George Augustus Lingham),—reciting the said agreement of the 10th of May, 1824, between the said John Kew and William Kew of the one part, and the said Thomas Lingham of the other part; and reciting the bankruptcy of the said Thomas Lingham, and the appointment of the said William Simpson as assignee as afore-
*133] said; and that the *plaintiff had contracted with the said Messrs. Dixon & Morgan, and with the said William Simpson, for the purchase of their several and respective rights and interests as thereinbefore recited, of and in the said debt secured by the said deed of mortgage of the 14th of March, 1817, which then amounted to the sum of 5692*l.* 19*s.* 11*d.*, and of all interest due and to become due in respect thereof, and of the said securities for securing the same, at or for the price of 500*l.*,—it was witnessed that the said premises comprised in the said annuity deeds were (in consideration of 500*l.* paid by the plaintiff, viz. one moiety thereof to Morgan & Dixon, and the other moiety to William Simpson) assured in manner therein expressed, by the parties of the first, second, third, fourth, and fifth parts, to the plaintiff for the residue of the said leases granted to the said William Lingham, subject to the annuities to Messrs. Thackeray and Ellis, and to the said underleases for securing the same,—upon trust for securing to the plaintiff the principal money secured by the indenture of the 14th of March, 1817, and interest. [A copy of this deed also accompanied the case.]

By an indenture made and dated on the 25th of April, 1839, between the said George Augustus Lingham and Thomas Lingham, described as executors of William Lingham, of the first part, Thomas Turnbull of the second part, and the plaintiff of the third part,—and which recited and recognised, amongst other things, the said agreement of the 10th of May, 1824, and the said payment by the said Thomas Lingham of the said sum of 550*l.* in part payment for the purchase of the said debt of 5705*l.* 8*s.* 8*d.* and interest, and the indenture of the 19th of June, 1827,—certain premises, being other than those included in the said annuity securities, were conveyed to the plaintiff, as therein mentioned, in consideration of the sum of 960*l.*, part of the mortgage debt secured
*134] by the said deed of the 14th of March, 1817, and *claimed by the plaintiff to be due from the said executors of the said William Lingham to him the plaintiff under and by virtue of the said last-mentioned deed, and of the said agreement of the 10th of May, 1824, and deeds of the 25th of May, 1824, and the 19th of June, 1827. And the said indenture contained a proviso that nothing therein contained should be construed, deemed, or taken in any manner to prejudice or other-

wise to affect the right of the plaintiff, his executors, administrators, or assigns, to the interest then due and owing on the said mortgage debt or sum of 5705*l.* 3*s.* 8*d.*, or to the sum of 4745*l.* 3*s.* 8*d.* (being the balance of the said mortgage debt, after deducting thereout the said purchase-money or sum of 960*l.*), or to the interest thenceforth to become due for the same, or to his or their rights or remedies against the said premises comprised in the said indentures of lease of the 15th of August, 1794, and 9th of January, 1795, or either of them, for the recovery thereof.

The plaintiff continued tenant to John Thackeray under the deed of the 11th of October, 1826, until some time in the year 1830, when his tenancy under that lease was put an end to, on his becoming tenant of the premises included in that lease, together with other portion of the premises comprised in the annuity-deeds, and called Lingham's Warehouses, at the rent of 550*l.*

There was no written agreement for this new tenancy, nor does it appear who was or were the demising party or parties, or what were the terms of it, except as may be inferred from the facts herein stated, or by the payments of rent hereinafter mentioned.

This rent was regularly paid by the plaintiff until Lady-Day, 1854, to an auctioneer and agent of the name of William Ellis, who received it as agent, during Mr. Thackeray's life, for him and Mr. Ralph Ellis, or his representative, in equal moieties; and the form of the receipts given by him was as follows:—

*"Received of Joseph Barber, Esq., the sum of 275*l.*, two quarters' rent due at ———, for Lingham's Warehouses, Lower Thames Street. [*135

"WILLIAM ELLIS, agent for
"Messrs. Thackeray and Ellis."

John Thackeray was the last of the cestuis-que-vie mentioned in his annuity-deed, and died in May, 1851. The defendants were his executors; and, from the time of his death, that is, for six half-years, Mr. William Ellis regularly applied for and received the rent of 550*l.* (amounting to 1650*l.*) as agent for them and for the representative of Mr. Ralph Ellis, and *accounted for it to them in equal moieties.*

By reason of the payments and deductions mentioned in the particulars of set-off, neither the said John Thackeray and Ralph Ellis, nor the representatives of either of them, had ever on any occasion actually received a moiety of the entire amount of rent paid by the plaintiff.

The amount actually paid over by William Ellis in respect of the said six half-years mentioned in the plaintiff's particulars, is, the sum of 606*l.* 16*s.* 9½*d.*, and no more, being the balance of all the rents paid by the plaintiff and by tenants of other parts of the premises included in the said annuity securities. This sum of 606*l.* 16*s.* 9½*d.* was paid by

William Ellis to the defendants, and to the representative of Mr. Ralph Ellis, in equal moieties.

The commission charged by William Ellis upon the rents received during the said six half-years amounts to the sum of 108*l.* 10*s.* 9*d.*

The portion of the said sum of 606*l.* 16*s.* 9½*d.* so paid over by the said William Ellis, which the defendants allege is attributable to or derived from the rent paid by the plaintiff, is, the sum of 534*l.* 16*s.* 7*d.*, and no more, having regard to the proportion of the charges and outgoings which is attributable to the portion of the premises held by the plaintiff. This last statement of *amount is not admitted by the plaintiff, but is inserted as explanatory of the case,—being the supposed amount or thereabouts.

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The last survivor of the cestuis-que-vie in Ellis's annuity-deed died in 1847.

The plaintiff was not aware until after the last payment of rent, in 1854, that all the cestuis-que-vie in the annuity-deeds were dead. Upon this being discovered, the attorneys for the plaintiff made a written demand on the defendants to refund the rents of the premises in Lower Thames Street, which the plaintiff alleged that the defendants had improperly received since their testator's death; and, such demand not being complied with, this action was commenced.

At the date of the agreement of the 25th of October, 1825, there was an arrear of 166*l.* 13*s.* 4*d.* on account of the annuity granted to the said John Thackeray, and an arrear of the same amount on account of the annuity granted to the said Ralph Ellis.

From the date of the said agreement, until the deaths of the said Ralph Ellis and of the said John Thackeray respectively, the arrears of the said annuities respectively continually increased.

At the time of the death of the said John Thackeray, the arrears of his said annuity,—irrespective of the sums of 342*l.*, 63*l.* 8*s.* 7½*d.*, and 90*l.* 2*s.* 8*d.* paid by him as aforesaid, and which three sums the defendants allege remained unpaid, but which the plaintiff alleges were satisfied out of the moiety of the rents of the property, in pursuance of the terms of the said agreement of the 25th of October, 1825,—amounted to a sum much larger than the said sum of 1650*l.* paid by the plaintiff in respect of the said six half-years mentioned in the particulars of demand.

In like manner, at the time of the death of the said John Thackeray, a considerable sum (much exceeding a moiety of the said sum of 1650*l.*) was due to the *representative of the said Ralph Ellis, for arrears of his said annuity, irrespective of the said sums of 342*l.*, 63*l.* 8*s.* 7½*d.*, and 90*l.* 2*s.* 8*d.* paid by the said Ralph Ellis as aforesaid, and which the defendants allege remained unpaid, but which the plaintiff alleges were satisfied out of the moiety of the rents of the property, in

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pursuance of the terms of the said agreement of the 25th of October, 1825.

The sums paid to the said John Thackeray and Ralph Ellis and his representative, under their securities, during the period, amounted to 4942*l.* 18*s.*, and were paid to them in equal moieties.

Mr. William Ellis, the auctioneer, received the rents of the other premises comprised in the annuity-deeds for the defendants and Mr. James Walter Elley Ellis, the representative of Mr. Ralph Ellis; and on their behalf he paid, on account of the premises comprised in the said deeds, including those occupied by the plaintiff, and for which he paid rent as aforesaid, the ground-rent, rates, taxes, tithes, and other charges and out-goings, including some repairs which are specified in the particulars of set-off, and which the defendants claim the right to set off or deduct.

The ground-rents mentioned in the particulars are those reserved by the said original leases of 1794 and 1795. The taxes and rates there mentioned were paid on behalf of the defendants and the said James Walter Elley Ellis, as the premises were let tax and rate free: and the premises in respect of which the said ground-rent taxes and rates were paid, were liable to and charged with the same: and the other moneys, for insurance and repairs and otherwise there mentioned, with the exception of the commission, were paid for the necessary protection and maintaining of the premises.

The defendants allege, but the plaintiff does not admit, that the portion of the items comprised in the said particulars of set-off, which arises in respect of the *premises occupied by the plaintiff, is, the sum of 1115*l.* 8*s.* 5*d.* [*138

The court was to be at liberty to draw any inferences of fact from the above statement. Either party was to be at liberty to refer to the documents accompanying the case.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover back from the defendants the amount of rent paid by him to the said Mr. William Ellis, as the agent of the defendants and Mr. James Walter Elley Ellis, since the death of the last of the cestuisque-vie, viz. the sum of 1650*l.*, or any portion thereof.

If the court is of opinion that the plaintiff is entitled to recover in this action, then the verdict is to be entered for such sum as the court shall direct; and, if the court directs that all or any of the payments made by Mr. William Ellis, so far as they are applicable to the premises for which the plaintiff has paid the rent, are to be deducted, then that proportion can be ascertained by the referee already appointed.

If the court thinks the action not maintainable, the verdict now entered is to be set aside, and a verdict entered for the defendants, with costs.

Cleasby (with whom was *Hugh Hill*, Q. C.), for the plaintiff.(a)—The
*139] first half-year's rent which was paid after *the death of the last of the cestuis-que-vie, having been paid to the agents of the defendants and J. W. E. Ellis under a mistake of facts,—in ignorance of their right to receive the rent having terminated,—the plaintiff is clearly entitled to recover it back. He was guilty of no laches. The demand of the rent, the person demanding it coming armed with power to distrain if it is not paid, amounting to an assertion on the part of the agent that the state of things upon which the right to demand it was founded continued to exist, it cannot be said that the plaintiff was guilty of laches in making the payments, or that he was bound to make any previous inquiry: Hasser *v.* Wallis, 1 Salk. 28. Indeed, it might almost be said that the money was obtained by means of a statement which was untrue: Polhill *v.* Winter, 3 B. & Ad. 114 (E. C. L. R. vol. 23), Crockford *v.* Winter, 1 Campb. 124. [CROWDER, J.—The case does not state that the agent made any false representation.] But he regularly demanded the rent; and that amounts to an assertion that he had a right to claim it, and at all events gets rid of the objection that the payments were voluntary. Nor can it be objected here that the action for money had and received will not lie for the purpose of trying the title to land. In Chitty on Contracts, 4th edit. (by Russell), p. 528, it is said: "The title to land or to an incorporeal hereditament cannot be tried in this action: and, accordingly, where rents are received under an adverse holding or possession, or by a person *claiming title* to land, but having no title, an action for money had and received is not the proper remedy against the party thus wrongfully obtaining such rents: Lindon *v.* Hooper, Cowp.
*140] 414; Cunningham *v.* *Laurentz, 1 Bac. Abr. 260; Clarance *v.* Marshall, 2 C. & M. 495, 502.† But where a tenant having paid rent to A., was ejected at the suit of a third person, who afterwards recovered mesne profits from him for the period in respect of which he had paid rent to A., it was held that the tenant might recover back such rent from A. in an action for money had and received, he not having set up any title to the premises at the trial:" Newsome *v.* Graham, 10 B. & C. 234 (E. C. L. R. vol. 21), 5 M. & R. 64. Then, it will be said that this is an equitable action; and it will be attempted to be shown, with reference to the agreement of the 25th October, 1825, set out in the case, that the defendants had certain equitable rights to the rents beyond the term granted by the annuity-deeds, which afford an answer to this action. But, assuming that the plaintiff is to be taken to have

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That he is entitled to recover back the money (1650*l.*) paid for rent to the tenant pour autre vie after the death of the cestui-que-vie (in May, 1851), such money being money paid under a mistake of facts. If the court is of opinion, under the circumstances, that there was not a joint receipt of the whole, and that the defendants only received a moiety, then the claim will be reduced to one-half.

"2. That there is no equitable title under the deeds of 1825 and 1826 which is now available.

"3. If there be any equitable title to the property, that the defendant cannot set it up as an answer to an action for money applied for and obtained in the manner stated."

had notice of that agreement, the clear inference from all the subsequent transactions set out in the case, is, that that claim must have been long since satisfied. The plaintiff is clearly entitled to recover back all the money paid, without deduction on account of ground-rent or otherwise.

Aspland (with whom was *Byles*, Serjt.), for the defendants.(*a*)—There is nothing upon the face of the case *to show that the defendants, when they received the rent in question, knew that their title to receive it was determined: there was no misrepresentation, no concealment, no fraud, either legal or moral, so as to bring the case within Crockford *v.* Winter, Polhill *v.* Walter, and that class of cases. This is not the proper form of action, the title to land being in question. It has repeatedly been held that the title to land cannot be tried in an action for money had and received. [CRESSWELL, J.—The legal title was not in dispute here. The defendants show no title to the land which would justify them in claiming the rent in question from the tenant.] At all events, the plaintiff has been guilty of such laches as to disentitle him to maintain this action. He was bound, before he paid the money, to avail himself of all the means of knowledge he had, to ascertain who were the persons entitled to the rent. The deed of the 11th of October, 1826, under which the plaintiff first became tenant of the premises, recites the agreement of the 25th of October, 1825, which gave Thackeray and Ellis a clear *equitable charge as against Thomas Lingham and any one claiming under him. The plaintiff cannot, therefore, contend that he had not notice of that agreement, and of the rights of Thackeray and Ellis under it. And, if a man has notice, when he purchases an interest in property, of another's title or right to a charge or encumbrance thereon, he takes it subject to that title or encumbrance. The operation of that agreement, was, to create an equitable charge on the premises in lease to William

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(*a*) The points marked for argument on the part of the defendants were as follows:—

"The defendants will rely, among other facts, on the fact of the plaintiff claiming title under Thomas Lingham (a party to the charging agreement of October, 1825), and also on the fact of the plaintiff being himself a party to the indenture of the 11th of October, 1826, by which he acquired a term in the premises, and which indenture recited and recognised the charging agreement.

"That, if the plaintiff has any right of action, the defendants are at all events entitled, either by way of deduction or set-off, to the benefit of the payments of ground-rent, taxes, rates, and out-goings bonâ fide made by the defendants, mentioned in this case; as the plaintiff had the benefit of those payments, and must have made the same if the defendants had not.

"That, as the sums claimed by the plaintiff were received by the defendants from time to time, bonâ fide, they are entitled to retain the whole, even without reference to the state of the title.

"That, if the plaintiff was not bound to pay, he paid from time to time by his own laches, and therefore cannot recover. But the defendants contend that an equitable right in the defendants to the rents would furnish an answer to the action, and that such equitable right is shown.

"That, by virtue of the agreement of the 25th of October, 1825, and the payments made by the defendants' testator and the other annuitant, the rents and profits of the premises, until the expiration of the original leases, expiring at Midsummer, 1854, were charged with the sums paid, and with all arrears and growing and future payments of the annuities; that those payments and the arrears of the annuities, are still unsatisfied; and that therefore the money claimed was received to the defendants' own use."

Lingham, for the sums of money thereby agreed to be paid by Thackeray and Ellis for the arrears of the annuities then due, and all the future payments thereof: and the case shows that the sums paid by Thackeray and Ellis in pursuance of the agreement, and the arrears of the annuity remaining unpaid, far exceed the amount of the money sought to be recovered back in this action. In the notes to Le Neve v. Le Neve (Ambler, 436), in 2 Tudor's Leading cases, 32 et seq., it is said: "No equitable doctrine is better established than that so clearly and forcibly laid down by Lord Hardwicke in the principal case, viz. that the person who purchases an estate, although for valuable consideration, after notice of a prior equitable right, makes himself a malâ fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat. "If," says his Lordship, "a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, machinatur ad subveniendum; and it is a maxim in our law, that fraus et dolus nemini patrocinari debet. Fraud or mala fides, therefore, is the true ground on which the court is governed in cases of notice." It may be laid down as a general rule, that a purchaser, with notice of a right in another, is in equity liable, to the same extent, and in the same manner, as the person from whom
*143] he made the purchase." *"If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; for, possession is primâ facie seisin, and the purchaser has therefore actual notice of a fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it: Taylor v. Stibbert, 2 Ves. jun. 437, 440; where Lord Rosslyn says,—'I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined that a purchaser, being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire."(a) [CRESSWELL, J.—The man was

(a) See Jones v. Smith, 1 Hare, 60.

in the occupation himself here, which involves a totally different principle.] "So, likewise, if the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant, which would have led him *to a knowledge of it: Daniels *v.* Davison, 16 Ves. 249, 17 Ves. 433;(*a*) even although the interest which the tenant may have were posterior to the lease under which he held: Allen *v.* Anthony, Meriv. 282." Allen *v.* Anthony, is an extremely strong case, inasmuch as it was extending the doctrine of constructive notice to things in which a tenant has not usually an interest, viz. the timber on the estate, and which he claimed under a contract made independent of and posterior to the contract under which he held possession of the estate. So, in Sugden's Concise View, p. 611, it is said, that, "in all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof; for, it was crassa negligentia that he sought not after it;(*b*) and, for the same reason, if a purchaser has notice of a deed, he is bound by *all* its contents."(*c*) It is clear, therefore, that the onus lay on the plaintiff, to show he had no notice: a person having an encumbrance upon an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase *of the estate: Sugden's Concise View, 592, citing Osborn *v.* Lea, 9 Mod. 96; Ingram *v.* Thorp, 7 Hare, 67. At all events, only a small portion of what is claimed can be recovered from the defendants in this case. By the agreement, one-half of the rents were to be paid to Ellis. The defendants, therefore, would primâ facie only be liable to the extent of one-half of the sums received. And out of this they are entitled to deduct all payments by the agent in respect of the premises, which the plaintiff himself would have been bound to make. [CRESSWELL, J.—The ground-rent was paid to protect your title. You may perhaps fairly contend that as to that you were misled by the plaintiff himself.] The taxes and rates also were a fair charge upon the premises, and ought to be deducted. The money paid for repairs and for insurance also should reasonably be allowed. The commission perhaps could hardly be insisted upon. [CRESSWELL, J.—Clearly not.]

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(*a*) And see Crofton *v.* Ormsby, 2 Sch. & Lef. 583, Meux *v.* Maltby, 2 Swanst. 281, Powell *v.* Dillon, 2 Ball & B. 416.

(*b*) Bisco *v.* Earl of Banbury, 1 Ch. Ca. 287; Moore *v.* Bennett, 2 Ch. Ca. 246; Ferrars *v.* Cherry, 2 Vern. 383; Drapers' Company *v.* Yardley, 2 Vern. 662; Mertens *v.* Joliffe, Ambler, 313; Bury *v.* Bury, Sugd. V. & P. App. No. 25, Coppin *v.* Fernyhough, 2 Bro. C. C. 291; S. P. per Lord Keeper Henley, Howarth *v.* Powell, T. Vac. 1758, MS., 1 Eden, 51, nom. Howorth *v.* Deem; Malpas *v.* Ackland, 3 Russ. 273; Buckley *v.* Lanauze, 1 Rep. t. Plunkett, 327; Davies *v.* Thomas, 2 You. & Coll. 334;† Webb *v.* Lugar, 2 You. & Coll. 247;† 1 Hare, 59; 1 Phill. 254; 2 Hare, 257; Nixon *v.* Robinson, 2 Jones & L. 14.

(*c*) Tanner *v.* Florence, 1 Ch. Ca. 259; Taylor *v.* Stibbert, 2 Ves. jun. 437; Hall *v.* Smith, 14 Ves. 426; Daniels *v.* Davison, 16 Ves. 249,—overruling Philips *v.* Redhil, 2 Vern. 160.

Cleasby, in reply.—The rule undoubtedly is, that an action for money had and received cannot be brought for the purpose of trying the title to land. But it has never yet been held that the plaintiff cannot recover in that form of action, merely because the title to land becomes incidentally involved in the inquiry. The facts stated in this case clearly do not show that the plaintiff has been guilty of any such laches as to incapacitate himself from recovering all that he can fairly and equitably claim in this action. [CRESSWELL, J.—There is nothing in that point.] The real question turns upon the supposed equitable right under the agreement of the 25th of October, 1825. It must, however, be borne in mind that the plaintiff does not claim under Thomas Lingham, but under the Messrs. Kew and him. Thomas Lingham had no power, even in equity, to charge the property beyond the extent of the money he had paid. *[CROWDER, J.—What do you understand by the words "all future and growing payments of the same annuity," in the agreement of 1825?] Those words merely refer to the application of the money. They were never intended to operate a further charge.

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Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—(*a*)

This was an action for money had and received. Pleas, never indebted, and set-off. The cause was tried before the late Lord Chief Justice Jervis, at the sittings after last Hilary Term, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of the court on a special case, the material parts of which may be thus shortly stated:—

On the 11th of January, 1811, one William Lingham was possessed, under two leases, dated respectively the 15th of August, 1794, and 9th of January, 1795, for two certain terms of years, both of which expired at Midsummer, 1854, of premises in the city of London, of which certain warehouses called Lingham's Warehouses formed part; and, by indenture of that date, in consideration of the sum of 2000*l.*, he granted to John Thackeray an annuity of 222*l.* 4*s.* 5*d.* for the lives of the said John Thackeray, and of one Elizabeth Yarnold, and of one Samuel Thackeray, and for the lives and life of the survivors and survivor of them, payable quarterly, and without deduction on account of any present or future taxes, charges, or impositions whatsoever, except property or income-tax: and, for securing the same, he demised to the said John Thackeray the said premises, including Lingham's Warehouses, for the term *of forty-three years from the 10th of January, 1811, if the said John Thackeray, Elizabeth Yarnold, and Samuel Thackeray, or the survivors or survivor of them, should so long live. By another indenture, of the 11th of January,

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(*a*) The judges present at the argument were, Cresswell, J., and Crowder, J.: Williams, J., being indisposed, and Willes, J., sitting at Nisi Prius.

1811, the said William Lingham, in consideration of another sum of 2000*l.*, granted to one Ralph Ellis another similar annuity of 222*l.* 4*s.* 5*d.* during the lives of the said Ralph Ellis and his sons Henry Ellis and Ralph Ellis, and the survivors and survivor of them: and, for securing the same, he demised to the said Ralph Ellis the same premises, including Lingham's Warehouses, for the term of forty-three years from the said 10th of January, 1811, if the said Ralph Ellis and his sons Henry Ellis and Ralph Ellis, or the survivors or survivor of them, should so long live.

In 1827, the premises in those annuity-deeds mentioned were assigned to the plaintiff for the residue of the terms granted to William Lingham, subject to the annuities to Messrs. Thackeray and Ellis, and to the said underleases for securing the same.

In the year 1825, Thackeray and Ellis were let into possession of the premises so underlet to them; and in 1830, the present plaintiff became tenant to them of part of the premises, at the rent of 550*l.*, payable to them in equal moieties. John Thackeray was the last survivor of the cestui-que-vies in his annuity-deed, and died in 1851. The defendants were his executors; and, from the time of his death until the expiration of the leases granted to William Lingham, that is, for six half-years, William Ellis, as their agent, regularly applied for and received the rent (550*l.*) for them and the representative of Ralph Ellis, and accounted for a moiety to each of them, deducting various sums paid on their account. The plaintiff seeks to recover the sums so paid for rent since the death of John Thackeray; and the defendants claim to set off the various sums so paid by their agents for them, *if the plaintiff is held to be entitled to recover in this action.

The money paid for rent by the plaintiff was certainly paid [*148 under a mistake of facts. The defendants had no right to any such payments: but the defendants say,—first, that, to allow the plaintiff to recover, would be to try the title to the property in an action for money had and received,—secondly, that, according to the facts stated in the case, it would be inequitable to allow the plaintiff to recover the money, and that, the action for money had and received being an equitable action, it is a good defence to show that the recovery would be against equity,—thirdly, they claim to set off various payments made by them for ground-rent, taxes, &c.

As to the first point, we think that this is not an action to try a disputed title to land: there is no dispute on the subject: it is a simple case of money paid after the title of the defendants' testator expired, the fact of its having so expired not being in any manner disputed.

The second point depends upon the effect of the agreement bearing date the 25th of October, 1825. It appears that shortly after the death of William Lingham, and before his will was proved, the ground-rents due from William Lingham in respect of the premises comprised

in the annuity-deeds being greatly in arrear, an arrangement was come to for discharging the same, and for other matters, by an agreement bearing date the day last mentioned, between John Thackeray and Ralph Ellis, and Thomas Lingham (the son of William Lingham), George Augustus Lingham, and one Richard Ellis. [His Lordship read the agreement.]

It was contended,—and, we think, rightly contended,—that the plaintiff must be taken to have had notice of this agreement: and the defendants say that the operation of it was, to create an equitable charge on the premises in lease to William Lingham for the sums of money *149] *thereby agreed to be paid by Thackeray and Ellis for the arrears of the annuities then due, and all the future and growing payments of the same; and that the sums paid by Thackeray and Ellis in pursuance of the agreement, and the arrears of the annuities now remaining unpaid, far exceed the money sought to be recovered in this action. But it appears to us that the agreement in question had not such an operation as the defendants now ascribe to it. The agreement shows, that, up to that time, Thackeray and Ellis had not been let into possession or into the receipt of the rents and profits of the premises devised to them to secure their annuities. It recited that the ground-rent payable by William Lingham was much in arrear, that Thackeray and Ellis each agreed to pay 342*l.* of that rent, and in order to induce them to do so, Lingham's executors agreed to prove his will, that the rents of the premises should in the first instance be applied to the payment of those sums, and *that the leasehold premises should be chargeable with those sums*, and that the residue of the rents should be applicable, *after payment of ground-rent and taxes*, to the payment of the annuities granted to Thackeray and Ellis. It then provided for giving possession to Thackeray of such parts of the premises as were in hand, and for the payment to him of the rents of such parts as were in lease. It then provided that the costs of that arrangement (not exceeding 600*l.*) should be paid out of the rents, and should be a charge on the said leasehold estates: and then concluded in these words,—"And that, for the purpose of securing the said several sums of 342*l.* and 342*l.* and the said costs and charges, an underlease or underleases, and not an assignment, by way of mortgage, and at a pepper-corn rent, shall at our costs and charges be executed to the said John Thackeray and Ralph Ellis respectively, or to a trustee for them and him respectively, *150] but that the sum to be secured to each *of them the said John Thackeray and Ralph Ellis for the said sum of 342*l.* and his share of such costs and charges, shall not exceed in the whole the sum of 942*l.*"

This agreement is not that any further charge on the leasehold estates of William Lingham shall be created, to secure either the arrears or future payments of the annuity; but, for the two sums of 342*l.* and

342*l.*, and costs not exceeding 600*l.*, there was to be a further charge by an underlease at a pepper-corn rent: and it may be taken that such underlease would include the whole of William Lingham's term, save one or two days. But there is no reason to suppose that the sums to be secured by such underlease are still unpaid. This very agreement provided that the rents should be applied in the first place to the payment of those sums, and the residue only to the payment of the annuities. Now, the rents received before Thackeray's death would far more than cover those sums; there is, therefore, no further equitable charge on the premises, to interfere with the right of the plaintiff to recover in this equitable action.

The remaining question relates to the set-off. If the defendants had been in possession, and had after ejectment been sued for mesne profits, they would have been entitled to an allowance for ground-rent; Doe *v.* Hare, 2 C. & M. 145:† and we think the same principle would extend to rates and taxes. If, instead of being sued for mesne profits, an action had been brought for use and occupation, we think the same allowances would have been made, in estimating the value of their occupation. On the same principle, in this action, which is to recover back money paid by mistake and without consideration, it is just and equitable to allow a deduction in respect of those payments which if not paid by them might have been claimed from the plaintiff as assignee of the original lease, and occupier of the premises.

To this it may be objected that the defendants cannot *show that [*151
the money was paid by them at the request, expressed or implied, of the plaintiff. But, from the year 1827, when the plaintiff became assignee of the original leases, he must have known that he was liable to pay the rent due to the ground-landlord; and he must be taken to have known, that, under the agreement of 1825, Thackeray was bound to pay that rent, and rates and taxes, out of the rents received by him: and, as he never took upon himself the payment of the ground-rent for which he was liable as assignee of the leases, or the rates and taxes which he was liable to pay as occupier, he must be taken to have sanctioned the continued payment of them by the parties to whom he paid rent. We are therefore enabled to say that this money was paid at the request of the plaintiff, and must be allowed by way of set-off.

Our judgment, therefore, is, that the plaintiff is entitled to recover in this action the five half-years' rent paid by him after the death of Thackeray; and that the defendants are entitled to set off the ground-rent, rates, and taxes paid by them in respect of the premises occupied by the plaintiff. Judgment accordingly.

In the Matter of WILLIAM VARDY EYRE, Gentleman. PALMER v. EVANS. *Nov.* 26.

Upon a rule calling upon an attorney to answer matters, the charge against him being that he had recovered from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed,—it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge, and pay the costs of the application.

MACNAMARA, on a former day in this term, obtained a rule calling upon William Vardy Eyre, one of the attorneys of this court, to answer the matters contained in certain affidavits, in which it was alleged that he had obtained from the defendant an excessive sum for costs, *upon an untrue assertion that judgment had been signed and execution issued.

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Phipson now showed cause, upon affidavits which failed to satisfy the court that the alleged extortion had not been practised, but which did satisfy them that Mr. Eyre was not himself personally cognisant of the matter.

Macnamara appeared to support his rule.

JERVIS, C. J.—Under the circumstances, I do not think this rule can be made absolute. But it seems to me that there has been very improper conduct on the part of some one in Mr. Eyre's office, in extorting from the defendant an excessive sum for costs under the false pretext that something had been done which in fact had not been done. It does not, however, appear to me that this matter came personally to the cognisance of Mr. Eyre. But, inasmuch as it was done in his office, and by a person for whose acts he is responsible, and as he received the money, I think he is so far implicated as to make him responsible. It is our duty to see that the power which the law has placed in the hands of the plaintiff and his attorney, is not made an instrument of extortion and oppression. I think the justice of the case will be answered by discharging this rule, on Mr. Eyre refunding the amount received by him in excess, and paying the costs of the rule.

The rest of the court concurring,

Rule discharged accordingly.(*a*)

(*a*) See Dunkley v. Farris, 11 C. B. 457 (E. C. L. R. vol. 73), where an attorney's *clerk* had fraudulently simulated the court seal upon a writ of summons, and the court set aside the writ and all proceedings thereon, and ordered the *attorney* (though blameless) personally to pay the costs.

*COOKE *v.* WILSON and Another. *Nov.* 11. [*153

A contract for the conveyance of goods from Liverpool to Australia was entered into as follows:—"It is this day mutually agreed between J. & R. W., owners of the ship Jessica, of the first part, and S. J. C. of the other part,"—that the ship should be ready by a given day to take on board certain specified goods, and should proceed therewith "to Geelong, in the colony of Victoria," and there deliver the same: "the rates of freight determined upon by *the said parties to this agreement*, are as under," &c.,—"*one-third to be paid in London, on receipt of bills of lading*, and the remainder by the Geelong and Melbourne Railway Company, at Geelong:" "goods to be taken on board at Liverpool at ship's expense:" and the agreement was signed,—"J. & R. W., S. J. C.:"—

Held, that S. J. C. was personally bound by this contract, and entitled to sue for a breach of it.

Held, also, that the court were bound to take notice that "Geelong, in the colony of Victoria," is a place out of England.

A declaration by S. J. C., after setting out the above contract in hæc verba, averred, that, although the goods were in the care and custody of the defendants for the purpose of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect, and default, certain of them were damaged, &c.:—Held, that the declaration disclosed a breach of duty arising out of the contract, for which the defendants were liable to an action at the plaintiff's suit.

THE declaration stated, that, on the first of December, 1855, it was agreed between the plaintiff and the defendants in the words and figures following,—"It is this day mutually agreed between Messrs. J. & R. Wilson, of Liverpool (meaning the defendants), owners of the ship Jessica of Liverpool, A.1. 858 tons, now at L., of the first part, and Samuel John Cooke (meaning the plaintiff), of London, *on behalf of the Geelong and Melbourne Railway Company*, of the other part,—That, the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall be ready on the 6th day of December to take in the under-mentioned goods in the M. Dock,—four locomotive engines complete, in parts, and cases, including duplicate gear; fourteen railway carriage bodies, and parts thereof, complete; two small iron box wagons; two large covered iron box wagons; fourteen under iron frames of carriages; sixteen cases, more or less, of springs and carriage materials, chiefly iron work; thirty to fifty pairs iron wheels and axles: the cargo not to exceed what the ship can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture: and, being so loaded, should therewith proceed to Geelong, *in the *colony of Victoria*, and there deliver, alongside the pier of the Geelong and Melbourne Railway Company, in Corio Bay, the aforesaid goods and locomotives. A period of twenty days is allowed for the discharge of the entire cargo; and the company's cranes and other assistance for the discharge thereof at their pier are to be given. The rates of freight determined upon by *the said parties to this agreement*, are as under:—A lump sum of 1100*l.* for the four locomotive engines complete, with duplicate gear; 85*s.* per ton of 40 cubit feet for the carriage-bodies and roofs; 65*s.* per ton of 20 cwt. for the iron box wagons, iron under frames, sixteen cases (more or less) of the materials in iron-work and wheels and axles: all with 5 per cent. primage thereon. *One-third of the total of freight to* [*154

be paid in London on receipt of bills of lading, and the remainder, viz. two-thirds, by the Geelong and Melbourne Railway Company, at the port of Geelong aforesaid. The ship to sail from Liverpool not later than the 25th of January. Demurrage over and above the said period of discharge at 10*l.* per day. Ship to be free of all dues and charges whilst lying at the company's wharf, Geelong. It is also agreed that the ship shall take the whole of the above packages. *Goods to be taken on board at Liverpool at ship's expense.* Penalty for non-performance of this agreement, 2000*l.* Dated, London, the 1st of December, 1855. J. & R. Wilson. Samuel John Cooke." Averment, that although afterwards, *the said goods*, and every part thereof, according to the terms of the agreement, *were in the care, custody, and possession of the defendants for the purpose of their being so taken on board* as aforesaid, *and the defendants took the said goods on board at the said ship's expense;* yet, by their wrongful act, neglect, and default in the premises, one of the said locomotive engines, whilst the same was so being taken on board as aforesaid, was suffered to slip *and fall, *155] and fell, and was and became thereby broken and much injured, and the plaintiff was thereby necessarily put to great expense, and necessarily thereby paid large reasonable sums of money in and about the necessary repairing of the said engine, and in and about procuring, keeping, and paying workmen and others to effect and superintend such repairs, and in and about the sending telegraphic messages to and from divers places, rendered necessary by the premises, and in and about paying wages to, and keeping and maintaining certain workmen who were to have accompanied the said goods on the aforesaid voyage, but who, by reason of the premises, were detained in England, and otherwise incidental to the premises; and, by reason of the premises, also the shipment and despatch of the said goods was much hindered and delayed, to the great damage of the plaintiff: and the plaintiff said that all things to entitle him to maintain this action had happened before suit: and the plaintiff claimed 200*l.*

The defendants pleaded,—first, that, at the time when the said locomotive engine in the declaration mentioned was suffered to slip and fall, and did fall, as in the declaration mentioned, the same was not in the care, custody, and possession of the defendants, and was not being taken on board the said ship by the defendants,—secondly, that the said locomotive engine was not suffered to slip and fall, and did not fall, by the wrongful act, neglect, and default of the defendants, as in the declaration mentioned.

They also demurred to the declaration, the ground of demurrer in the margin, being,—"that the declaration does not show any promise by the defendants to the plaintiff to keep for the purpose mentioned, and take on board, the said goods safely and securely; and that it does

not show any bailment of the same by the plaintiff to the defendants." Joinder.

J. Brown, in support of the demurrer.(a)—The plaintiff was not the proper person to sue. The only concern he has with the accident, is, a contract set out in the declaration, in which he appears as a party contracting as agent on behalf of a railway company. For anything that appears, the moment he had signed the contract, his authority as an agent was at an end; for, it cannot be larger than he has himself represented it to be. He could not have been sued for a breach of the contract by the railway company. [CROWDER, J.—He does not profess to sign "as agent."] In Tanner *v.* Christian, 4 Ellis & B. 591 (E. C. L. R. vol. 82),—which will probably be relied on as an authority for the plaintiff,—it sufficiently appeared throughout the agreement that the defendant was to be the acting party. In Lucas *v.* Beale, 10 C. B. 739 (E. C. L. R. vol. 70), A., a member of the orchestra of the Italian Opera, "on behalf of the orchestra," signed the following proposal,—"The gentlemen of the orchestra are willing, and hereby pledge themselves, to continue their services, and attend their duties, provided B. will guaranty the payment of thirteen nights due on the 5th ult." B. accepted the proposal by writing in these terms,—"B. will accept the proposition made by A. on behalf of the gentlemen of the orchestra, and he will appoint the treasury to be open on the 19th inst. to pay the thirteen nights due on the 5th ult., and he pledges himself to open the treasury on the 10th and 25th of *August, to make further payments." A. in his own name brought an action for a breach of this engagement, describing it in his declaration as a contract made with him and the other performers: and the court held that the contract was joint, and that A. could not sue upon it alone. [CRESSWELL, J.—The obvious distinction between that case and the present, is, that there the plaintiff professed to sign the agreement for himself and the other performers.] In Downman *v.* Williams, 7 Q. B. 103 (E. C. L. R. vol. 53), where an undertaking by an attorney "on behalf of his clients," to pay money, was held not to render the attorney personally liable, Tindal, C. J., in giving the judgment of the court of error, says: "In Appleton *v.* Binks, 5 East, 148, 1 J. P. Smith, 361, upon which the most reliance was placed, the only point decided, was, that a man who covenanted for himself and his heirs, under his own hand and seal, for the act of another, should be personally liable, though he described himself as agent in the deed,—a very

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(a) The points marked for argument on the part of the defendants, were,—

"That the declaration does not show any cause of action in the plaintiff: That it shows the plaintiff to have been merely an agent for the purpose of effecting a contract for the carriage of goods for parties named: That it does not show any bailment or trust by the plaintiff to the defendants: That it does not show any duty by the defendants to the plaintiff to take the goods on board safely: And it does not show any interest had by the plaintiff in the goods, or how the damage arose to him."

different proposition from that now before us: for, the question before us is more properly this,—if a person enters into a contract in writing, describing himself as agent, and naming his principal, whether the principal shall be bound, provided the agent had authority to enter into the contract on his behalf,—a point which we consider too clear to admit of doubt or argument." [CRESSWELL, J.—In the earlier part of the judgment, the Lord Chief Justice says: "The very terms of the letter itself,—'I undertake (on behalf of Messrs. Esdaile & Co.) to pay,' would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another, than as intended to bind the party speaking in the character of a principal; for, upon the latter supposition, there would appear to be no reason whatever for mentioning the name of the principal." Here, there *is* a reason for naming the principals.] The only reason there could be for mentioning
*158] *the company, could be, for the purpose of showing that the plaintiff was contracting as agent, and not on his own behalf. Besides, this is not an action brought for a mere breach of the contract to carry the goods from Liverpool to Geelong. It is an action for damage done to the goods in the course of the transit; to enable the plaintiff to maintain which, he is bound to show that he has some connexion with, or interest in the goods, as consignor, consignee, or otherwise: Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Coats *v.* Chaplin, 3 Q. B. 483 (E. C. L. R. vol. 43), 2 Gale & D. 552. In Marshall *v.* The York, Newcastle, & Berwick Railway Co., 11 C. B. 655 (E. C. L. R. vol. 73), a declaration in case against a railway company, for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost: and it was held, that the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid *by the plaintiff;* but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. Williams, J., there says: "It seems to me that the whole current of authorities, beginning with Govett *v.* Radnidge, 3 East, 62, and ending with Pozzi *v.* Shipton, 8 Ad. & E. 963 (E. C. L. R. vol. 35), 1 P. & D. 4, establish that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort, is, in Fitzherbert's Natura Brevium, *Writ de Trespass sur le Case*, where it is said,—p. 94 D.,—'If a smith
*159] *prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well;

for, it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary." In the present case, it *would* be necessary to show a contract with the plaintiff. [CRESSWELL, J.—The shipowners are to take the goods on board at the ship's expense: and they assume to take them on board by their servants: are they not bound to take care of them?] The defendants do not engage to ship the goods themselves; but merely to pay for putting them on board. Upon the whole, therefore, it is submitted, that the plaintiff is not the proper person to sue upon this agreement,—that there was no breach of the contract, inasmuch as it did not extend to the putting the goods on board,—that the plaintiff is not shown to have had any interest in the goods, as trustee or otherwise,—and that the special damage is not the gist of the action; and, if it were, that it should have been alleged with more certainty: 2 Wms. Saund. 243 *d*.

Byles, Serjt., contrà.—The plaintiff signs the contract in his own name, and not as agent. It is an universal rule, that, if a man signs a contract in his own name, and there is nothing in the contract that is inconsistent with that construction of it, he is personally responsible for its fulfilment, even although there may be a principal who may be liable also. The rule is so laid down in the notes to Thomson *v.* Davenport (9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110), in 2 Smith's Leading Cases, 4th edit. 298. This is a contract of charter made by the plaintiff for a foreign principal. It begins: "It is this day mutually agreed between Messrs. J. & R. Wilson (the defendants), *owners of the ship Jessica, of the first part, and S. J. Cooke (the plaintiff), on behalf of the Geelong and Melbourne Rail- [*160 way Company, of the other part." It may be conceded, that, if that had not been followed by a signature in its present form, there might have been some difficulty in the construction contended for on the part of the plaintiff. The subsequent language, however, removes all ambiguity:—"The rates of freight determined upon *by the said parties to this agreement*, are as under," &c. "One-third of the total freight to be paid *in London on receipt of bills of lading*,"—by the plaintiff, of course,—"and the remainder, viz. two-thirds, by the Geelong and Melbourne Railway Company, at the port of Geelong aforesaid." Could the now plaintiff have insisted, if an action had been brought against him for not having the goods ready for shipment, or for non-payment of the stipulated freight, that he was no party to this contract? In Tanner *v.* Christian, 4 Ellis & B. 591 (E. C. L. R. vol. 82), a written agreement was expressed to be made "between Christian, *for and on behalf of Norris*, of the first part, and Tanner of the second part." By it, "Christian, *on the part of Norris*, agreed to let to Tanner certain premises for a term of years, Tanner paying rent to

"Christian, *for the use of Norris:*" no auction to be held on the premises without the "consent in writing of Christian, *on the part of Norris:* Tanner to take a lease, and execute a counterpart thereof, when called upon to do so by Christian *on the part of Norris.*" Christian signed the agreement in his own name: Norris did not sign it. In an action by Tanner against Christian for not completing the lease,—it was held, that it sufficiently appeared to be the intention of the parties that Christian should himself contract, and that therefore he was personally liable. The two cases are almost identical. Lord Campbell there says: "It appears that, throughout the whole transaction, from beginning to end, *Christian is to be the acting party. *161]
I think, therefore, that the intention was that he was to carry the contract into effect: and he signs the agreement, not by procuration for Norris, but in his own name; so that, I think, he personally undertakes for its performance. From the authorities cited, particularly Norton *v.* Herron, R. & M. 229, it seems to be decided, that, in an agreement worded like this, the person signing it is personally liable. Lewis *v.* Nicholson, 18 Q. B. 503 (E. C. L. R. vol. 83),"—which was decided upon the authority of Downman *v.* Williams, 7 Q. B. 103 (E. C. L. R. vol. 53),—"does not at all conflict with our decision; for, the defendants in that case were not in any way to act in carrying out the agreement: they were solicitors, who signed a promise for and on behalf of their clients, but were not themselves to do anything." Lennard *v.* Robinson, 5 Ellis & B. 125 (E. C. L. R. vol. 85), differs from the present case only in the circumstance of the charter-party not being there stated to have been made by the defendants on behalf of their principals. Lord Campbell there says: "I do not attach much weight to the fact that the alleged principal is a foreigner; for, a part of the contract was to be performed in Memel, where he resides, and none in England, where the defendants reside. But, looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract, they are contracting parties: and they may well become so 'by authority of and as agents for' their employer; that is, he may be made liable to them. That, however, does not alter the effect of the instrument by which they become contracting parties as between themselves and the plaintiff." And Coleridge, J., expresses himself to the same effect, except that the learned judge attaches some weight to the circumstance of the principal being a foreigner. In Mahony *v.* Kekulé, 14 C. B. 390 (E. C. L. R. vol. 78), the contract was expressed to be made "between Vacher *162]
*& Tilly, Morlaix, and Mahony:" and the defendant signed it "for Vacher & Tilly, Charles Kekulé:" he, therefore, incurred no personal liability. This action clearly is founded on the contract. The agreement provides that the goods are to be taken on board at the

ship's expense: and the declaration alleges that the defendants had the goods in their possession for the purpose of taking the same on board, and did take them on board; but that, in so doing, they were guilty of the wrongful act which caused the injury complained of. That is a sufficient allegation of a breach of duty arising out of the contract, for which the defendants are liable.

Brown was heard in reply.

CRESSWELL, J.—I am of opinion that the plaintiff is entitled to the judgment of the court upon this record. We have been told by Mr. *Brown*, that, if we decide in favour of the plaintiff, it will be difficult in future for agents to enter into contracts on behalf of their principals, and thus much inconvenience will result to the commercial world. A very simple way of avoiding that inconvenience would be, to sign the document in the names of the contracting parties, "by so and so, as agents," or "by procuration." Prima facie, when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him. I find no circumstances of that sort in this case. The contract professes to be made between the plaintiff and the defendants. It begins, "It is this day mutually agreed between Messrs. J. & R. Wilson of the first part, and Samuel John Cooke of the other part." It is true, the words "on behalf of the Geelong and Melbourne Railway Company," are added. It seems, at all events, that the Geelong and Melbourne Railway *Company is a company existing abroad: whether there only, we have no means of knowing. The goods [*163 are to be delivered pursuant to the contract "in the colony of Victoria," which we may take judicial notice is out of England. But the plaintiff, residing in London, professes to make the contract; and he signs it with his own name. After providing for the shipment and discharge of the goods, the provision in the contract as to freight is as follows, —"The rates of freight determined upon by *the said parties to this agreement*, are as under." Who are "the said parties to this agreement?" Why, the plaintiff and the defendants. Then the parties stipulate that "one-third of the total of freight shall be paid in London on receipt of bills of lading." The performance of that part of the contract is imposed upon the plaintiff; the payment of the remainder of the freight being agreed to be made by the company at the port of Geelong. There is, therefore, ample evidence on the face of the instrument that it is treated as a contract between the plaintiff and the defendants. Then, the defendants contract to carry the goods from Liverpool to Geelong, in the colony of Victoria, and there deliver them alongside the pier of the Geelong and Melbourne Railway Company. And, further, the goods are "to be taken on board,"—not *put*, but *taken* on board,—"at Liverpool, at ship's expense." Whatever care, therefore, was required to be taken to ship the goods safely and securely, was understood and intended to be

taken by and at the expense of the defendants. The declaration alleges, that, although the goods, according to the terms of the agreement, were in the care, custody, and possession of the defendants for the purpose of their being so taken on board, and the defendants took them on board at the said ship's expense, through their neglect one of the locomotives was injured, and the plaintiff put to expense in repairing the damage.

*164] It appears to me that the duty of *taking care that the goods were safely shipped necessarily arose out of the contract, and that the defendants are responsible for the consequences of their negligence.

CROWDER, J.(a)—I also am of opinion that the plaintiff is entitled to our judgment. It is said that the plaintiff is no party to the contract. I find, however, that it is signed by him. I have always understood the law to be, that, if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only. There is nothing upon the face of this agreement distinctly showing that the plaintiff was contracting as agent for others. On the contrary, there is everything to lead to the conclusion that he was contracting personally. I agree with my brother Cresswell that it is fairly to be inferred from the agreement that the payment of one-third of the stipulated freight was to be made by the plaintiff on receipt of the bills of lading,—more especially as we may infer from the whole agreement that the goods were to be shipped for a company having no existence in England. It has been insisted that we cannot take judicial notice that Geelong is not in England. The contract, however, states that place to be "in the colony of Victoria;" and we are bound to take judicial notice of the existence of that colony. The contract, then, being for the transportation of goods from Liverpool to Geelong, in the colony of Victoria, it seems to me that everything leads us to the inevitable conclusion that the person who signs the contract signs it as a substantial party. The next question is, whether the loss or damage is sufficiently stated to be with reference to that contract. The goods were

*165] to be taken on board at Liverpool at the ship's expense. *The allegation in the declaration, is, that, in pursuance of the agreement, they were taken possession of by the defendants for the purpose of being so taken on board, and that, in taking them on board, one of the locomotives was damaged through the defendants' neglect and default. It appears to me that that is clearly a loss from a breach of the duty imposed upon the defendants by their contract, and for which the defendants are responsible. The plaintiff, therefore, is entitled to judgment. Judgment for the plaintiff.(b)

(a) Williams, J., was indisposed, and Willes, J., was sitting at Nisi Prius.

(b) See Gillett v. Offor, 18 C. B. 905 (E. C. L. R. vol. 86), and the authorities there cited.

It is not sufficient to charge the principal or protect the agent from personal responsibility, merely to describe himself as agent if the language of the in-

strument imports a personal contract on his part. Pentz *v.* Stanton, 10 Wendell, 271. In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient, if it appear in such contract that he acts as agent. Andrews *v.* Estes, 2 Fairfield, 267; Shotwell *v.* M'Kown, 2 Southard, 828. Where, on the face of a contract, signed by an agent on behalf of his principal, it appears to be the intention that it shall be the contract of the principal, the agent will not be liable thereon, notwithstanding the principal resides in a foreign country. Rogers *v.* March, 33 Maine, 106.

An agent to whom as such, a contract is in terms made payable, may maintain an action upon it in his own name. Doe *v.* Thompson, 2 Foster, 217; Bird *v.* Daniel, 9 Alabama, 302.

*DELANEY *v.* FOX. *Nov.* 14. [*166

The 1st sect. of the 1 & 2 Vict. c. 74 enables a landlord whose tenant refuses to give up possession on the tenancy being duly determined by a legal notice to quit, to give him notice, "in the form set forth in the schedule," of his intention to proceed to recover possession under the act; and, provides, that, if the tenant shall not appear at the time and *place* appointed, and show reasonable cause why possession should not be given under the provisions of the act, upon proof of the holding and of the determination of the tenancy, &c., and upon proof of the service of the notice, and of the tenant's refusal to quit, the justices may issue their warrant, and give possession to the landlord.

The form of notice given in the schedule begins "I, ———, [owner, *or* agent to ———, the owner, *as the case may be*], do hereby give you notice," &c., and intimates that the party giving it will, "on ——— next, the ——— day of ———, at ——— of the clock of the same day, at ———, apply to Her Majesty's justices of the peace acting for the district of ———, in petty sessions assembled, to issue their warrant," &c.

By s. 3, the mere obtaining a warrant is declared to be a trespass, if the person to whom the warrant is granted had not at the time of granting it lawful right to the possession of the premises, although no entry should be made by virtue of the warrant.

And s. 6 enacts, that where the landlord, at the time of applying for the warrant, *had lawful right to the possession of the premises*, he shall not be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the act; but that the party aggrieved may bring an action on the case for such irregularity, or informality, in which the damage alleged to be sustained *thereby* shall be *specially laid*.

A declaration stated that the plaintiff, after the passing of the act, was tenant to the defendant of certain premises, and that the defendant caused to be served upon her a notice (setting out the notice), which commenced thus, "I, J. D., of Bradford, in the county of York, attorney and agent for and on behalf of Gregory Fox, of, &c., farmer, do hereby give you notice," &c., and informed the plaintiff that "I, as attorney and agent for the said Gregory Fox, shall, on Tuesday, the 1st day of January next, at 11 o'clock of the same day, apply to Her Majesty's justices of the peace acting in and for the borough of Bradford (being, &c.), in petty sessions assembled, to issue their warrant," &c. The declaration then went on to state that the defendant, without the plaintiff having appeared before such justices, or having been heard to show cause, or had any means or opportunity to show cause, against the issuing of such warrant as in the notice mentioned, procured to be issued and executed on the plaintiff a certain warrant (setting it out), whereby and under the authority of which proceedings the plaintiff was forcibly ejected and expelled from the premises:—

Held, that the notice was informal, for not mentioning the *place* in the borough of Bradford where the application was to be made; and also, *cone semble*, for omitting to state that J. D., the person giving the notice, was agent to *the owner* of the premises.

Held, also, that the count, though somewhat informal, was a good count in *trespass*.

The defendant pleaded, that the tenancy was duly determined by notice to quit before the happening of the matters in the count mentioned, and that, at the time of applying for the warrant, *he had lawful right to the possession of the premises*, which were wrongfully held over by the defendant:—Held, that the plea was a good answer to the action,—the 6th section of the statute

confining the tenant's remedy, where the landlord has lawful right to the possession, to an action upon the case founded on the special damage arising to him from the irregularity or informality of the proceeding, and no special damage being alleged in the count.

As to the right of a tenant to maintain trespass against his landlord for a forcible expulsion, where the landlord has a legal right to the possession of the premises,—*quære?*

THE first count of the declaration stated that the defendant broke
*167] and entered a certain dwelling-house *and premises of the plaintiff, situate in Ebenezer Street, in the borough of Bradford, in the county of York, and numbered 12 in the said street, and then and there forcibly ejected and expelled the plaintiff therefrom, and had kept her forcibly ejected and expelled therefrom ever since.

Second count, that the plaintiff theretofore, and after the passing of a certain act of parliament made and passed in the year of our Lord 1838, and intituled "An act to facilitate the recovery of possession of tenements after due determination of the tenancy," was tenant to the defendant of a certain dwelling-house and premises, to wit, the dwelling-house and premises in the said first count mentioned: yet the defendant caused to be served on the plaintiff, as such tenant as aforesaid, a written notice in the form, words, and figures following, viz. "I, Joseph Dawson, of Bradford, in the county of York, attorney and agent for and on behalf of Gregory Fox, of Great Horton, in the parish of Bradford aforesaid, farmer, do hereby give you notice, that, unless peaceable possession of the tenement or dwelling-house situate in Ebenezer Street, Bradford aforesaid, which was held of the said Gregory Fox under a tenancy from week to week, which was determined by notice to quit from the said Gregory Fox on the 17th day of December instant, and which tenement or dwelling-house is now held over and detained from the said Gregory Fox, be given to the said Gregory Fox, or to me on his behalf, on or before the expiration of seven clear days from the service of this notice, I, as attorney or agent for the said Gregory Fox, shall on Tuesday, the 1st day of January next, at eleven o'clock of the same day, apply to Her Majesty's justices of the peace acting in and for the borough of Bradford (being the district, division, or place in which the said tenement or dwelling-house is situate), in petty sessions assembled,
*168] to issue their warrant directing the *constables of the said district to enter and take possession of the said tenement or dwelling-house, and to eject any person therefrom. Dated this 21st day of December, 1855. S. Dawson. To William Delaney and Ellen Delaney;" and without giving to or serving on the plaintiff any other notice, and without the plaintiff having appeared before any such justices as in the said notice is mentioned, or having been in anywise heard to show cause, or had any means or opportunity of showing cause, against the issuing of such warrant as in the said notice is mentioned, procured to be issued, and caused to be executed on the plaintiff, according to the exigency thereof, a certain warrant under the hands and seals of two such justices as aforesaid, in the form, words, and figures following, that

is to say,—"Landlord and tenant order. Borough of Bradford, in the West Riding of Yorkshire. Whereas, a complaint in writing was made by Joseph Dawson, the legal agent of Gregory Fox, your landlord, before two of Her Majesty's justices of the peace in and for the said borough, that one Ellen Delaney and William Delaney, tenants of a certain tenement, consisting of a tenement or dwelling-house situate in Ebenezer Street, in the township of Bradford, in the said borough, held under a tenancy from week to week, under the rent of 2*s.* 6*d.* per week and which said tenancy was determined by a notice to quit given by the said Gregory Fox on the 7th day of December, 1855; and that, on the 21st day of December, 1855, a notice in writing of the intention of the said Joseph Dawson, as such agent, to apply to recover possession of the said dwelling-house or tenement was duly served upon the said premises, which on this day was duly proved on oath before us: We, two of Her Majesty's justices of the peace in petty sessions assembled, acting in and for the said borough of Bradford, do authorize and command you on any day within thirty clear days *from the date hereof (except on Sunday, Christmas day, and Good Friday), between the [*169 hours of nine in the forenoon and four in the afternoon, to enter (by force, if needful), and with or without the aid of the said Joseph Dawson, as such agent, or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said Joseph Dawson, as such agent as aforesaid. Given under our hands and seals, this 1st day of January, 1856. W. M., J. H. To William Leveratt and all other constables and peace officers acting for the borough of Bradford aforesaid:" whereby and by means and under the authority of which proceedings so taken as aforesaid by the defendant, the plaintiff was forcibly ejected and expelled from, and had ever since been kept forcibly ejected and expelled from her said dwelling-house and premises.

Pleas,—first (to the first count), liberum tenementum,—secondly (to the second count), that the said tenancy in the last count mentioned was a tenancy from week to week, so long as the defendant and the plaintiff should respectively please, at a rent of less than 20*l.* per annum, that is to say, at the rent of 2*s.* 6*d.* per week, and upon which no fine was ever reserved or made payable; that the said tenancy was duly determined by due notice to quit, and had ended, before any of the matters or things in the last count mentioned had happened or taken place; and that he, the defendant, before and at the time of the happening and taking place of all and every of the matters and things in the last count mentioned, and at the time of applying for such warrant as is in the last count mentioned, had lawful right to the possession of the said dwelling-house and premises in the last count mentioned, which, at the time of the applying for the said

*170] warrant, and at the times when all the *matters and things in the last count mentioned respectively took place and happened, were wrongfully held over by the plaintiff after the expiration of the said tenancy in the last count mentioned.

The defendant also demurred to the second count, the ground of demurrer stated in the margin being,—"that, upon the face of the second count, all the proceedings appear to have been regular, and that no illegality in those proceedings is shown on the face of that count." Joinder.

The plaintiff joined and took issue on the pleas, and also demurred to the second plea, the ground of demurrer stated in the margin being, —"that the plea does not answer the count, and shows no right to the possession in the defendant as upon a warrant from justices, and does not justify the grievances complained of." Joinder.

Milward, in support of the plaintiff's demurrer.(*a*)—The proceedings set out in the second count of the declaration are not in accordance with the requirements of the statute upon which they profess to be founded. The 1st section of 1 & 2 Vict. c. 74, recites that "it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy;" and enacts, that, "when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding seven years, *171] either without being liable to the payment of any rent *or at a rent not exceeding the rate of 20*l.* a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof), any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, *in the form set forth* in the schedule to this act," —not saying *or to the like effect*,—signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed by this act; and, if the tenant or occupier shall not thereupon appear, *at the time and place appointed*, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the

(*a*) The points marked for argument on the part of the plaintiff, were,—"that the second count is good, as the proceedings set out are not in accordance with the requirements of the statute 1 & 2 Vict. c. 74, and the schedule to the act; and that the plea demurred to is bad, as not affording any answer to the charge of irregularities in the proceedings, as complained of."

provisions of this act, and shall still neglect and refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and, upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands *and seals to the constables and peace-officers of the district, [*172 division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty days nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent." The notice, therefore, must be in the precise form given in the schedule; and that form requires that the time and the *place* at which the application to the justices is to be made shall appear. Here, the notice neither mentions the place where the application is to be made, nor does it state that the application is made on behalf of the "owner" of the premises. [CRESSWELL, J.—Do you insist that a landlord who is not the *owner* of the premises, cannot take advantage of the statute?] No: the landlord would be the owner for that purpose. But it should be shown upon the face of the document that the party claiming is in that sense the owner. Whether it be material or not, is not the question: the statute requires it. The omission of the place, however, is the more important one. Seeing that it is competent to the justices to hold a petty session where they please, it is obviously necessary that full information of the place of assembly should be given to the tenant. [CRESSWELL, J.—Is not the mention of the town or village enough, without mentioning the sign of the public-house?] Bradford is a large place. Would it have been enough to say "in the west riding of the county of York?" [CRESSWELL, J.—Perhaps not.] Is the plaintiff bound to know where the justices hold their petty sessions in the borough of Bradford? The statute evidently intended that she should have full information on the subject. [CRESSWELL, J. —If the statute had intended that the notice should mention more than the town or borough, I should have expected to find the words more precise: they would probably have been *thus,—"at———, [*173 in the parish of ———, in the borough of ———."] It is submitted that the statute is imperative: if the form of the notice

which the statute provides is not strictly followed, the whole foundation upon which the proceedings rest, fails.

The second plea raises substantially the same question: if the last count is good, the second plea is no answer to it. It will be contended for the defendant that the second count does not show any special damage. It, however, shows that the plaintiff was turned out of the house, and that surely is special damage enough.

*174] *Prentice*, contrà.(a)—The second count is *substantially a count in trespass: it alleges an unlawful entry and expulsion under colour of a warrant: and the plea shows that the defendant had a lawful right to enter. Assuming that all the proceedings before the magistrate were illegal and void, the defendant is still entitled to succeed in this action, inasmuch as, the plaintiff's tenancy having been legally put an end to, he had a right to enter. [CRESSWELL, J.—Newton v. Harland, 1 Scott, N. R. 474, 1 M. & G. 644 (E. C. L. R. vol. 39). WILLIAMS, J.—If the court should think that the proceedings were only irregular, there is a good count in case alleging the irregularity. You may treat it either way.] It is submitted that the second count is nothing more than a count in trespass, and that the plea is clearly a good answer to it. A civil action cannot be maintained for a forcible entry. In Harvey v. Brydes, 14 M. & W. 437, 442,† though it became unnecessary to decide the point, Parke, B., said: "The next point was that raised in Newton v. Harland: and, if it were necessary to decide it, I should have no difficulty in saying, that, where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the

(a) The points marked for argument on the part of the defendant, were,—

As to the demurrer to the second count,—"That that count does not disclose any cause of action: that the proceedings set forth in that count are regular within the true intent and meaning of the act of parliament in that count mentioned: that, if that count does disclose any defect in the proceedings therein set forth, such defect amounts to a mere informality or irregularity, which would only be actionable, under the 6th section of that statute, in case of special damage, to be set forth on the face of the count, and that the last count discloses no such special damage: that the count is bad, for not alleging that the proceedings set forth therein were taken by the defendant maliciously and without reasonable or probable cause: that, even if the proceedings set forth in that count were not merely informal and irregular, but void, the special count would not be maintainable, but a count in trespass only: that the last count is bad as a count in trespass, as it does not directly allege the plaintiff's possession and the defendant's entry upon that possession, and it is consistent with all that appears in that count that the tenancy may have expired, and that the plaintiff may have been wrongfully holding over, and that the defendant may have had a right of entry upon the plaintiff's possession, so that an action of trespass would not be maintainable."

As to the demurrer to the second plea,—"That that plea is good in substance, as showing that the defendant was entitled to take the proceedings for recovery of possession in the last count mentioned, and also as showing a right of entry in the defendant on the plaintiff's possession, irrespective of that statute; so that the plaintiff could not sustain the last count as for an informality or irregularity in the proceedings, which the defendant was entitled to take, without showing special damage; nor as a count in trespass, for proceedings wholly void, the last plea disclosing a right of entry by the defendant on the plaintiff's possession, and the unlawfulness of that possession as against the defendant."

shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it *is a perfectly good justification to say that the plaintiff was in possession [*175 of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." In Burling *v.* Read, 11 Q. B. 904 (E. C. L. R. vol. 63), to a declaration in trespass charging that the defendant broke and entered the plaintiff's workshop, *while the plaintiff was inhabiting and present in it*, and, *while the plaintiff was so inhabiting and present*, pulled it down, the defendant pleaded pleas asserting that the workshop was the defendant's and denying that it was the plaintiff's: and it was held, that, on issues joined upon these averments, it was immaterial whether the plaintiff was or was not inhabiting and present at the time of the alleged trespass; and that the defendant was entitled to the verdict, upon proof that he had a right to the soil. Many other authorities might be referred to, to show that a civil action cannot be maintained for a forcible entry; and that the averment of vi et armis is a mere formal allegation, and does not amount to an allegation of a forcible entry. The second count alleges that the tenancy was duly determined by a notice to quit, and that the plaintiff wrongfully held over, in defiance of the defendant's lawful right to the possession. It would be strange, indeed, if the defendant should find himself in a worse position by reason of his having obtained the warrant. The mere obtaining a warrant is declared by s. 3, to be a trespass, if the person to whom the warrant is granted had not at the time of granting it lawful right to the possession of the premises, although no entry should be made by virtue of the warrant. Next, it is submitted that the only action that can be brought under this statute, is, an action upon the case alleging special damage, pursuant to s. 6, which enacts, "that, where the landlord, at the time of applying for such warrant as aforesaid, had lawful right to the possession of the *premises, or of [*176 the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may if he think fit bring an action on the case for such irregularity or informality, *in which the damage alleged to be sustained thereby shall be specially laid*, and may recover full satisfaction for such special damage, with costs of suit: provided, that, if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that, if proved, but assessed by the jury at any sum not exceeding 5*s*., the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record, that, in his opinion, full costs ought to be allowed." Here, no special damage is alleged. [WILLIAMS,

J.—What sort of special damage do you say is contemplated by the act? Are there costs given?] The justices have power to give costs in all cases. It is difficult to say what the legislature meant by special damage: but they clearly must have meant something more than the mere expulsion from the premises, or there would have been no difficulty in stating it. Then, as to the objection that the form given by the statute has not been *strictly* complied with. If that objection be well founded, the omission of a single letter would be fatal. It is enough, however, if the notice served substantially follows the form. [CRESSWELL, J.—In some instances, as in cases under the Uniformity of Process Act, 2 W. 4, c. 39, the Registration of Voters Act, 6 & 7 Vict. c. 18, and the recent Bills of Exchange Act, 18 & 19 Vict. c. 67, the parties have been held bound to follow the prescribed forms with extreme closeness and precision.] The notice here given, is, it is
*177] submitted, a perfect compliance with *the form prescribed. The objections to it are, that the defendant is not stated to be the "owner" of the premises; and that the "place" at which the party is to appear to show cause why the warrant should not issue, is not sufficiently pointed out. The name of the landlord or owner is, however, stated in the notice; and the pleadings show that Gregory Fox is the owner. Then, as to the place, the party is informed that the application will be made to the justices acting in and for the borough of Bradford, on a given day, and at a given hour. She was bound to know where the petty sessions are held.

Milward, in reply.—The plaintiff is entitled to recover on both counts; and the pleas afford no answer. Professing to act upon the statute, the defendant serves the plaintiff with an irregular notice, and causes her to be turned out of the premises, without giving her the means of appearing to show cause against the issuing of the warrant. If special damage be necessary, it is sufficiently alleged.

CRESSWELL, J.—I am of opinion that the plaintiff is entitled to the judgment of the court upon the second count of the declaration in this case, and that the defendant is entitled to judgment on the demurrer to the second plea. The second count begins with stating that the plaintiff, after the passing of the statute 1 & 2 Vict. c. 74, was tenant to the defendant of certain premises, and that the defendant caused to be served upon her the notice set out, and, without the plaintiff having appeared before such justices, or having been heard to show cause, or had any means or opportunity to show cause against the issuing of such warrant as in the notice mentioned, procured to be issued and executed on the plaintiff a certain warrant, which is also set out, whereby and
*178] *under the authority of which proceedings the plaintiff was forcibly ejected and expelled from the premises. Primâ facie that, though somewhat strange and informal, is still a count in *trespass*, and therefore such as to entitle the plaintiff to judgment thereon. But

then comes the second plea, which shows that the landlord had a right to the possession of the premises, and therefore would be entitled to enter. That being so, the learned counsel for the plaintiff insists that the second count may be treated as a count in *case*, and as relying not on the ground of want of title in the defendant to enter, but on the ground of his having proceeded irregularly under the act. Whether or not the plaintiff can so contend, may be open to a little doubt, seeing that in the first part of the count she disputes the defendant's title to the possession. I do not, however, say that it cannot be sustained as a count charging irregularity in the proceedings. But then comes the 6th section of the statute, which says, that, "where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of such premises, neither the landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser *by reason merely of any irregularity or informality in the mode of proceeding* for obtaining possession under the authority of this act,"—here the defendant has been guilty (we may assume) of an irregularity, the notice not being in the form required by the statute: that, therefore, precludes the plaintiff from recovering in trespass: but the statute goes on,—"but the party aggrieved may if he think fit bring an action on the case for such irregularity or informality, *in which the damages alleged to be sustained* THEREBY *shall be specially laid.*" Now, I do not find any special damage alleged as arising from the informality of the proceeding: it is not averred that the plaintiff was turned out of the premises, or was *put to any costs, or sustained any other damage by reason of the irregularity. For these reasons, I am of opinion that the plaintiff must have judgment on the demurrer to the second count, and the defendant must have judgment on the demurrer to the second plea. [*179

WILLIAMS, J.—I am of the same opinion. Looking at the facts disclosed in the second count and in the second plea, it appears to me that this is one of the cases contemplated by the 6th section of the 1 & 2 Vict. c. 74. Upon the present principles of pleading, it is our duty, where, upon the whole facts disclosed upon the record, it appears that the plaintiff is entitled to maintain the action, to hold him to be so entitled, notwithstanding any mere informality in the mode of alleging the ground of complaint. But, in the present case, it does not appear that the plaintiff is entitled to maintain the action, because the 6th section of the act only gives him a right to bring an action alleging specially the damages he has sustained by reason of any irregularity or informality in the mode of proceeding for obtaining possession of the premises under the authority of the act. No such special damage is alleged here. The terms of the 6th section certainly are somewhat obscure. It does not seem to have occurred to the minds of the legislature that the landlord might be entitled to enter without the aid of a warrant.

CROWDER, J.—The first question in this case arises upon the demurrer

to the second count of the declaration, and that is as to the validity of the notice there set out. The plaintiff insists that she has disclosed a good cause of action in that count, because she has shown that she was served with an informal and irregular notice under the statute, and was, without having appeared, or having the means or opportunity of *appearing to object, expelled from the premises under a warrant founded upon that informal notice. It seems to me that the notice set out was an informal notice, inasmuch as it omitted to specify the place at which the plaintiff was to appear for the purpose of showing cause against the issuing of a warrant. It seems to be rather doubtful whether the notice ought also to have alleged in terms that the party giving it was the agent of the owner of the premises: but, on the ground before stated, I think the notice was informal.(a) Assuming the notice, then, to be informal, the next question is whether there is a good cause of action stated in the second count. I agree that it is not now necessary that the cause of action should be alleged with any precise formality: and I think there is a ground of action sufficiently stated in the second count, and therefore that there should be judgment for the plaintiff on the demurrer to that count. Then comes the demurrer to the second plea. That plea contains the important allegation that the defendant had lawful right to the possession of the premises, the plaintiff's tenancy having been duly determined by a notice to quit, and the plaintiff having wrongfully held over. This renders it necessary to refer to the 6th section of the 1 & 2 Vict. c. 74, which provides, that, where the landlord at the time of applying for the warrant had *lawful right* to the possession of the *premises, he shall not be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of the act; but that the party aggrieved may bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained *thereby*,—that is, the damage arising from the irregularity or informality,—shall be specially laid. *This* is an action for the irregularity: it is therefore made specially necessary that the ground of action shall be laid by way of special damage. Now, what damage is alleged in the second count to have arisen from the irregularity in the mode of proceeding? It appears upon the whole record that the plaintiff ought to have been turned out of possession. It is said she had no proper notice to appear. Suppose she had appeared, all that she could have heard would have been, that she had no right to retain possession of the premises, and must be turned out. I therefore think the second plea is

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(a) This doubt is generated by the position in which the word "owner" is found in the former. The first time it is used, it is improperly pleaded *within* the brackets, as part of the words of direction, instead of being, as it should have been, pleaded *outside* as part of the substance of the form. This form (as, indeed, are all the forms given in the schedule to this act) is throughout very inaccurately printed in this respect; some of the directory words being placed as part of the body of the notice: so that a notice in literal compliance with the form would clearly be a bad notice.

a good answer to the count to which it is pleaded, and that the defendant is entitled to judgment on the demurrer thereto.

Judgment for the plaintiff on the demurrer to the second count, and for the defendant on the demurrer to the second plea.

*LOVER *v.* DAVIDSON. *Nov.* 6. [*182

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition.

A., being in New York, and wishing to publish a song there and in London simultaneously, entered into some agreement for an assignment of the *American* copyright to a publisher in New York:—Held, that a receipt for the purchase-money was no evidence of the assignment: and, held, that the date on the title-page (as required by the American law) was not conclusive evidence of the time of publication in New York.

The author and proprietor of copyright in a song, in the entry at Stationers Hall described his place of abode as "65, Oxford Street," he being in America at the time of publication, and having no place of abode in England, but "65, Oxford Street," being the address of his publishers:—Held, a sufficient description to satisfy the 5 & 6 Vict. c. 45, s. 13.

THIS was an action brought by the plaintiff against the defendant for pirating the words and music of a song called "The Low Back'd Car," of which the plaintiff claimed to be entitled to the copyright as author.

The cause was tried before Willes, J., at the sittings in Middlesex after the last term. The facts were as follows:—

"The Low Back'd Car,"—the words, the prelude, and the accompaniment being entirely written and composed by the plaintiff, but the air being an old one, known by the name of "The Jolly Ploughboy,"—was first published in this country on the 7th of December, 1846, and was entered in the book at Stationers' Hall as of that date, the persons described as the proprietors of the copyright being "Duff & Hodgson, 65 Oxford Street." This entry, however, was amended pursuant to an order of Jervis, C. J., of the 15th of March, 1855, by striking out the names of "Duff & Hodgson," and inserting in lieu thereof the name of "Samuel Lover," leaving the entry in all other respects as it was.(*a*) It appeared, that, when the original entry was made, the plaintiff was residing at New York, having no place of abode in England; and that, prior to the publication of the song in question in England, the plaintiff had sold *the copyright,—so far as concerned America,—to persons of the name of Firth & Hall, [*183 music publishers at New York: but the only evidence of this transaction was, the production by the defendant of a receipt for the purchase money bearing the signature of the plaintiff; the reception of which was objected to on his behalf.

For the defendant it was attempted to be shown that there had been

(*a*) See Ex parte Davidson, 18 C. B. 297 (E. C. L. R. vol. 86).

a prior publication of The Low Back'd Car in New York; and, for this purpose, the defendant produced a copy of the song, which had been purchased at the shop of Firth & Hall, in New York, and which purported on the face of it(*a*) to have been published on the 4th of December, 1846, three days before the date of the entry and publication in England. But it turned out that the actual day of publication in New York, was, on or after the 7th of December, 1847, the date on the piece of music produced being satisfactorily shown to be a mistake.

On the part of the defendant, it was insisted, that, to entitle him to maintain the action, the plaintiff must show that he was the author of the whole piece, including the air; that there had been no sufficient entry at Stationers Hall, the author's true place of abode not being stated; and that the sale of the American copyright operated an extinction of the plaintiff's claim, inasmuch as there could be no partial assignment of copyright.

The learned judge, reserving leave to the defendant to move to enter a verdict for him, directed the jury to find for the plaintiff, which they accordingly did, with 40*s*. damages.

*184] *Bovill* now moved to enter a verdict for the defendant, *pursuant to the leave.—1. There is nothing in the copyright act, 5 & 6 Vict. c. 45, to give the exclusive right of publication to any one except the author of the work,—that is, the whole work,—or to his assignee. Here, the plaintiff was confessedly not the author of the air. [CRESSWELL, J.—What did the defendant pirate?] The whole. [CRESSWELL, J.—I cannot say, as a matter of law, that a jury might not be justified in finding that the publication was new.] There certainly is a case in this court,—Leader *v.* Purday, 7 C. B. 4 (E. C. L. R. vol. 62),—where it was held that one who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as the proprietor of the copyright in *the whole* composition. 2. It appeared, that, prior to the publication of this song in England, the plaintiff had sold the copyright to Messrs. Firth & Hall, of New York. By the law of this country, it seems pretty clear that there cannot be a partial assignment of copyright. In Jefferys *v.* Boosey, 4 House of Lords Cases, 815, 992, Lord St. Leonards says:(*b*) "If there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license: but copyright is one and indivisible; or, is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient

(*a*) The American law requiring the date of the first publication to appear.

(*a*) And Jervis, C. J., in Shepherd *v.* Conquest, 17 C. B. 437 (E. C. L. R. vol. 84), states that in this many of the judges concurred with the noble lord.

than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the *inconvenience would be. You might have a separate transfer [*185 of the right of publication in every county in the kingdom. If, however, the right, as I am advising your Lordships, is properly one and indivisible, then let us see what construction can be put upon the assignment from Ricordi to Boosey. The exercise of the right is confined in the assignment to the United Kingdom. Now, by the 41 G. 3, c. 107, copyright is extended to any part of the British dominions in Europe; and, by the 54 Geo. 3, c. 156, it was further extended to every part of the British dominions. It is quite clear, therefore, that, if in this case there was a copyright, under the law of this country it was a copyright which extended to every portion of the British dominions. Then, as Ricordi limited his assignment to the United Kingdom, and therefore reserved to himself the right as regarded the publication in every other part of the British dominions, even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all." [WILLES, J.—Upon this point the whole foundation of your argument fails, there being no evidence of an assignment to Firth & Hall.] The receipt was some evidence. [WILLES, J.—None whatever.] 3. The entry at Stationers Hall was not a compliance with the statute. By the 13th section of the 5 & 6 Vict. c. 45, the entry is to contain the title of the book, &c., the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and *place of abode* of the proprietor of the copyright: and s. 24 enacts "that no proprietor of copyright in any book which shall be first published after the passing of this act, shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any *infringe- [*186 ment of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers Company, of such book, pursuant to this act," &c. Now, the plaintiff admitted that No. 65, Oxford Street, never was his place of abode. In fact, he was residing in New York at the time the entry was made.(a) The entry, therefore, clearly was no compliance with the act. [CRESSWELL, J.—Mr. Lover had at that time no other place of abode in England. He might, therefore, very properly describe himself as of a place where he might be communicated

(a) By the American law, it appears that the entry of copyright can only be made by a *citizen* of the United States, or by one who is permanently resident therein. See Curtis on Copyright (American), 141-144.

with.] If such a laxity of description be permitted, an important provision of the statute may at all times be easily evaded.

CRESSWELL, J.—I am of opinion that there is no ground for a rule in this case; and my reasons sufficiently appear from the observations thrown out during the argument.

The rest of the court concurring, Rule refused.

*187] *Ex parte ANNE TRENERY. *Nov.* 21.

The court refused to grant a rule to enable a married woman to execute a conveyance under the 3 & 4 W. 4, c. 74, s. 91, without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent: but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so.

HAWKINS moved for a rule to enable Mrs. Anne Trenery, a married woman, who was living apart from her husband, by mutual consent, to convey (under the 3 & 4 W. 4, c. 74, s. 91) her interest in certain property to which she was separately entitled in her own right, without her husband's concurrence. [CRESSWELL, J.—Does your affidavit show that the husband has been asked to execute the deed, and has refused to do so?] It does not. [CRESSWELL, J.—Then you cannot have a rule. This court so decided in a case of In re Hester Murphy, 5 Scott, N. R. 166, S. C. nom. Ex parte Mirfin, 4 M. & G. 635 (E. C. L. R. vol. 43).]

Per Curiam. Rule refused.(*a*)

(*a*) And see In re Sarah Woodcock, 1 C. B. 437 (E. C. L. R. vol. 50), In re Isabella Grierson Perrin, 14 C. B. 420 (E. C. L. R. vol. 78).

Where the husband is lunatic, of course, it is not necessary that the affidavit should show that he refuses to concur; but the affidavit must show that he is lunatic *at the time of the application:* Ex parte Thomas, 4 M. & Scott, 331 (E. C. L. R. vol. 43); In re Jane Turner, 3 C. B. 166 (E. C. L. R. vol. 54).

*188] *SARL and Another *v.* BOURDILLON. *Nov.* 17.

The defendant went into the plaintiff's shop, and agreed to purchase certain goods in the aggregate exceeding the value of 10*l.* The several articles, with their respective prices, were entered in the plaintiffs' "order book," *on the fly-leaf at the beginning of which were written the names of the plaintiffs;* and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain:—Held a sufficient signature of the contract *by both parties* to satisfy the 17th section of the Statute of Frauds.

One of the articles was described as "candlestick, complete." It was proved, that, at the time the goods were selected, it was arranged that a "gallery" should be added to the top of the candlestick for the reception of a "mosquito-shade:"—Held, that the memorandum was sufficient, without mentioning the "gallery."

At the time of the contract, it was agreed that the goods should be paid for by a check on the defendant's brother:—Held, that the omission of that stipulation did not vitiate the memorandum.

THIS was an action for goods bargained and sold. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in Middlesex after last Easter Term. The facts were as follows:—The defendant, who was about to proceed to India, went into the plaintiffs' shop for the purpose of purchasing certain goods. The goods were selected, amongst them being two chamber candlesticks to which galleries were to be fixed for the purpose of holding mosquito shades. In all other respects, all the articles were complete. A list of the goods purchased was entered in the plaintiffs' order-book, the chamber candlesticks being therein described as "candlesticks, complete." This book had the words "Order Book" printed in gold letters outside, and the names "Sarl & Son" written on the fly-leaf at the beginning. At the foot of the entry in question appeared the name and address of the defendant, in his own handwriting,—"Capt. Bourdillon, 29, Inverness Terrace, Bayswater." It was part of the bargain, but not so stated in the above note of it, that the goods were to be paid for by a draft on the defendant's brother (not being a banker), at No. 14, Throgmorton Street.

On the part of the defendant, it was insisted that there was no sufficient note or memorandum in writing of the contract to satisfy the 17th section of the Statute of *Frauds,—first, because the vendors' [*189 names did not appear upon the contract,—secondly, because it did not contain all the terms of the bargain, no mention being made therein of the galleries which were to be added to the chamber candlesticks, or of the stipulated terms of payment.

For the plaintiffs it was insisted, that, taking the book, with the words printed on the outside, and the names of the plaintiffs written on the fly-leaf, and the signature of the defendant at the foot of the entry, there was a sufficient compliance with the statute.

The learned judge,—after putting two questions to the jury, viz. first, whether the order was written in the plaintiffs' book before the defendant wrote his name therein; secondly, whether the defendant so wrote his name in the book for the purpose of verifying the order; both of which questions were answered in the affirmative,—reserving leave to move to enter a verdict for the defendant, directed the jury to find for the plaintiffs for the amount claimed.

Byles, Serjt., in Trinity Term last, pursuant to the leave so reserved, moved to enter a verdict for the defendant, or a nonsuit.—The 17th section of the 29 Car. 2, c. 3, enacts "that no contract for the sale of any goods, wares, and merchandises, for the price(*a*) of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of *the said bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." To satisfy that section, the note or

(*a*) See Harman v. Reeve, 18 C. B. 587 (E. C. L. R. vol. 86).

memorandum of the contract must contain the signatures of both vendor and vendee. Thus, in Jacob *v.* Kirk, 2 M. & Rob. 221, it
*190] *was held that a memorandum of sale of goods in the vendor's book, *signed by the vendee* in initials, the vendor's name not appearing in the book, is not a sufficient note in writing to satisfy the statute; and that the defect was not cured by a letter from the vendee, in which the vendor's name did appear, but which letter did not clearly refer to the memorandum. So, in Champion *v.* Plummer, 1 N. R. 252, it was held, that a note or memorandum in writing of a contract for the sale of goods, *signed by the seller only*, is not sufficient. "How," says Sir James Mansfield, C. J., "can that be said to be a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs. There cannot be a contract without two parties; and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." In order to get rid of that difficulty at the trial, the plaintiffs' counsel referred to the outside of the book, on which appeared in gold letters "order book," and to the fly-leaf at the beginning of the book, on which the names "Sarl & Son" were written; and it was insisted, that, coupling these with the entry and the defendant's signature, the names of both the contracting parties sufficiently appeared. That, however, does not answer the objection. The party, when he signs the contract, must see, or have the means and opportunity of seeing or knowing what he signs. If the book in question had been a continuation of a former volume, the vendor's signature in the first clearly could not be coupled with that of the vendee in the second. [JERVIS, C. J.—Ocular view cannot affect the question. Perhaps no living person ever saw the
*191] head of the old roll in the Exchequer.] There is a material *difference between a record and a memorandum of a contract under this statute. [JERVIS, C. J.—Take the ordinary case of an invoice with a printed heading containing the tradesman's name, where the enumeration of the articles bought is continued on the back; would not the vendee's signature at the end conclude him, though he never saw the face of the paper?] In that case, the vendor has the means, by turning over the paper, of seeing that the same contract that binds him binds the vendor also. Then, it is necessary that *all* the terms of the bargain should be in writing: Kenworthy *v.* Schofield, 2 B. & C. 945 (E. C. L. R. vol. 9), 4 D. & R. 556 (E. C. L. R. vol. 16). "You cannot," as Holroyd, J., says, "call that a memorandum of a bargain, which does not contain the terms of it." Here, too, two of the articles, viz. the chamber-candlesticks, were unfinished; something remained to be done to them. Again, one of the terms of the bargain

was, that the goods were to be paid for by a check on the defendant's brother; and of that no mention is made in the memorandum. [WILLES, J.—That was a mere statement as to the mode of payment. JERVIS, C. J.—There is nothing in that point: but upon the others, the rule may go.]

E. James, Q. C., and *Bennett*, on a subsequent day in the same term, showed cause.—The entry in the book was under the circumstances a sufficient memorandum within the 17th section of the statute of frauds. The book contained all that was necessary to constitute a perfect contract,—the name of the vendors (at the beginning), the articles agreed to be purchased and their prices, and the signature of the vendee at the foot of the entry; the latter being placed there, as the jury distinctly found, for the purpose of verifying the order. There is no case precisely in point: but Allen *v.* Bennett, 3 Taunt. 169, approaches very near it. It was there held, that an order for goods, written and signed by the seller, in a *book of the buyer's, but not naming the buyer, might be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the statute. Lawrence, J., in the course of the argument, observed,—"If the plaintiff's name *had been in this book*, I suppose there would have been no doubt about it: and that brings it to the case of Champion *v.* Plummer." And Sir James Mansfield said, in giving judgment: "To be sure, this case at first sight comes near to the case of Champion *v.* Plummer, and the objection certainly there was that the memorandum was not signed by the purchaser. That was a note made in what the report calls a common memorandum book: this book certainly was not like what I at first apprehended it to be, until it was produced; for, I at first thought this had been an order book, with several orders signed by the person who ordered them, and I thought, that, *where such an order was inserted in a regular order book, and supposing that the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, were consonant, it would in that case be no great stretch to say that this was a ground for inferring that these entries were made by the authority of the owner of the book, for the purpose of evidencing the sale.*" It is then said that the mode of payment ought to have formed part of the memorandum. [JERVIS, C. J.—The court disposed of that when the rule was moved.] Then as to the candlesticks,—it is contended that the stipulation that they should be fitted with galleries to hold mosquito-shades formed part of the bargain, and that was not in writing. The entry, however, describes the candlesticks as "complete." Some meaning must be given to that word. Assuming that that objection is well founded, the contract is divisible: *the order was not for a number of articles at a lump price, but each article was priced separately. [CRESSWELL, J., referred to Baldey *v.* Parker, 2 B.

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& C. 37 (E. C. L. R. vol. 9), 3 D. & R. 220 (E. C. L. R. vol. 16).] The galleries were a mere accessory to the candlesticks. Alterations and additions made in the progress of the manufacture of goods contracted for, need not be in writing: Hoadley v. Maclaine, 4 M. & Scott, 340, 10 Bing. 482 (E. C. L. R. vol. 25).

Byles, Serjt., and *Karslake*, in support of the rule.—Baldey v. Parker is a distinct authority to show that the contract is not divisible. In Scott v. The Eastern Counties Railway Company, 12 M. & W. 33,† it was held, that, where an order is given for goods, some of which are ready made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole within the statute of frauds and Lord Tenterden's act (9 G. 4, c. 14, s. 7), as the whole forms one entire contract. "If," says Alderson, B., "a man enters into an entire agreement for goods made and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement. That is the true object and meaning of the statute." It was proved, that, in the course of the bargain, the defendant ordered galleries to be fixed to the candlesticks. No evidence was given as to the cost of this addition. [CRESSWELL, J.—What is to be the evidence of the contract?] That which passes by parol. [CRESSWELL, J.—Then you would alter it by parol evidence?] It is competent to show what the contract was, by parol, in order to show whether it is within the statute or not. Where a price is agreed upon at the time, the memorandum must state the price: Elmore v. Kingscote, 5 B. & C. 583 (E. C. L. R. vol. 11), 8 D. & R. 343 (E. C. L. R. vol. 16); but the absence of a statement
*194] of the price, where none is agreed *on, does not vitiate the contract: and that must be shown by parol. [CRESSWELL, J.—Primâ facie the contract would be imperfect if the price were not in it. You are allowed to give parol evidence to negative the mention of the price at the time of the contract, which lets in what the law infers, viz. a reasonable price.] Kenworthy v. Schofield is a distinct authority to show that the whole terms of the contract must appear in the memorandum; and Elmore v. Kingscote shows that parol evidence of what the real terms of the contract were may be given, in order to ascertain whether or not they are all in writing. Hoadly v. Maclaine was the case of an article to be manufactured, which is a totally different case from this. [CRESSWELL, J.—Do you find any case where there was a memorandum in writing, and all the prices fixed except that of one item of less value than 10*l.*?] None. The vendors' names do not sufficiently appear upon the memorandum, or by express reference, to constitute this a good contract within the statute of frauds: Boydell v. Drummond, 11 East, 142, commented on in 1 Smith's Leading Cases, 4th edit. 230. The plaintiffs' names did not so appear that the

defendant could see them. Then, the mode of payment was a term of the contract which should have been evidenced by writing. If the defendant had tendered a check upon his brother, the plaintiffs clearly could not have refused to deliver the goods at once. [CRESSWELL, J.—Do you say, that, if goods are sold at six months' credit, that must appear upon the written memorandum?] Yes. [CRESSWELL, J.—Or, if there had been a course of dealing for a given credit, parol evidence is to be let in to prove that course of dealing?] Yes, for the purpose of showing that the whole terms of the contract are not in the writing.

JERVIS, C. J.—There is one point in this case which is deserving of consideration, viz. whether the memorandum *was sufficient without the mention of the mosquito-shades which were to be added [*195 to the candlesticks. The other points, however, may be at once disposed of. The payment by check on the defendant's brother was no part of the bargain. We also think that the names of the contracting parties sufficiently appear, to satisfy the statute. The book was the plaintiffs' order book; their names were written at the beginning of it; and the defendant's name was written under the entry, for the purpose of verifying the bargain. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:

This case was argued in Trinity Term last before the late Lord Chief Justice, my Brothers Williams and Willes, and myself. The court intimated their opinion at the time as to all the objections but one, as to which they took time to consider. I now proceed to give the result of our deliberation upon the point so reserved:—

In this case, inasmuch as the defendant declined to go to the jury, and insisted that there was no evidence of a memorandum to satisfy the statute of frauds, it may be assumed that the defendant wrote his name in the plaintiffs' book, intending it as a signature to an order to the plaintiffs, whose order book it was, and whose names were written in the beginning of it in the usual way. This, with the observations made in the course of the argument, disposes of all the objections raised, except that relating to the description of the candlestick, which was one of the articles ordered. It was thus described,—"Candlestick complete;" and it was insisted for the defendant, that, because at the time of giving the order it was arranged that the candlestick to be supplied should be furnished with a gallery to carry a mosquito *shade, therefore [*196 the addition of the shade formed a part of the bargain and ought to have been stated in the memorandum.

Upon consideration, we do not feel obliged to yield to this argument. The memorandum states all that was to be done by the person charged, viz. the defendant, and, according to the case of Egerton *v.* Matthews, 6 East, 307, 2 J. P. Smith, 339, that is sufficient to satisfy the 17th

section of the statute of frauds, though not to make a valid agreement in cases within the 4th section.

Moreover, the difficulty which may arise as to the sufficiency of the precise candlestick supplied to fulfil the contract, is not greater than that of identity which even in an agreement under the 4th section may be left to parol evidence. Thus, in Spicer *v.* Cooper, 1 Q. B. 424 (E. C. L. R. vol. 41), it was held, that "sold 14 pockets Kent hops, at 100*s*.," might be explained to mean 100*s*. per cwt.; and it was not even argued that the apparent ambiguity as to the price, caused by the omission of any statement of the quantity for which the 100*s*. was to be paid, rendered the note or memorandum insufficient to satisfy the 17th section.

The rule must therefore be discharged. Rule discharged.

*197] *CARD *v.* CARR and Others, Trustees of the GUARDIAN BUILDING SOCIETY. *Nov.* 21.

By one of the rules of a benefit building society, each member was to pay 10*s*. per share per month, together with certain fines in case of default; and it was provided that "any member not having executed a mortgage to the society as thereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for *six* consecutive monthly nights, should *thereupon* cease to be a member of the society, and forfeit all his or her interest therein." By other rules, the general management was vested in twelve directors, a meeting or quorum of whom was to consist of *five*.

The plaintiff, a member of the society (not having executed a mortgage), neglected for *seven* successive months to pay his monthly subscription in respect of a share held by him, but afterwards tendered the amount of his subscription, and the fines payable thereon, to *two* of the directors, who were in attendance for the purpose of receiving payments, and who accepted the same. At the first monthly meeting of the directors after the money was so paid, it was resolved that the plaintiff had on the sixth default ceased to be a member of the society, and forfeited all his interest therein; and it was ordered that his name should be erased, and the money received from him by the two directors be returned to him:—

Held, that the share was properly forfeited; that the acceptance of the money by the directors under the circumstances did not amount to a waiver of the forfeiture; and that the rule was not unreasonable.

THIS was an action brought by the plaintiff against the defendants as trustees of a benefit building society called "The Guardian Building Society," according to the statutes in such case made, to recover the sum of 35*l*. as money had and received by the said society for the use of the plaintiff, and upon accounts stated between the plaintiff and the said society.

The defendants pleaded the following pleas,—

First, as to 4*l*. 6*s*. 6*d*., parcel of the money claimed [that the said society, at the time when the said sum of 4*l*. 6*s*. 6*d*., parcel, &c., became due and payable, was, and from thence hitherto had been, and still was, ready to pay the plaintiff the said sum of 4*l*. 6*s*. 6*d*. parcel, &c.; and that, after the time when the said sum of 4*l*. 6*s*. 6*d*., parcel,

&c., became due and payable, and before the commencement of this suit, the said society was ready and willing to pay, and then tendered and offered to the plaintiff to pay him the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., to receive which of the said society the plaintiff then wholly refused; and the defendants, on behalf of the said society, brought the said 4*l.* 6*s.* 6*d.* into court, &c.

*Secondly, except as to 4*l.* 6*s.* 6*d.*, that the said society never was indebted as alleged. [*198

Thirdly, to the first count, except so far as the same related to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., that, long before and at the time of the accruing of the supposed causes of action in the said first count mentioned, and to which that plea was pleaded, the benefit building society in the declaration mentioned, to wit, the Guardian Building Society and Accumulating Fund, was, and from thence hitherto had been, and still was, a benefit building society established under and by virtue of the act made and passed in the 6 & 7 W. 4, c. 32, for the regulation of benefit building societies; that, long before and at the said time when, &c., all the rules for the management of the said society, and under which the said society then was and thereafter was to be governed and guided, had been and were, and from thence hitherto had been and were, duly and according to law, and according to the statute in such case made and provided, entered in a book kept by an officer of the said society appointed for that purpose, and which said book before and at the respective times aforesaid was and still is open at all seasonable times for the inspection of the members of the said society; and long before and at the said time when, &c., all the said rules had been made and transcribed pursuant to the provisions of the statutes in such case made and provided, and also certified by John Tidd Pratt, Esq., the barrister appointed to certify the rules of savings banks and friendly societies, to be in conformity to law, and with the provisions of the said first-mentioned statute; and the said rules and transcripts thereof, so certified as aforesaid, had been and were allowed, deposited, filed, and kept pursuant to the statutes in such case made and provided; and the said rules, before and at the said time when, &c., and from thence hitherto, had been, and still were, in full force; and the said society, *before and at the respective times aforesaid, was, and from thence hitherto had been and still was, entitled to the benefit of the said statutes respectively: That, before and at the said time when, &c., and from thence hitherto, there were and still are, amongst the said rules, certain rules in the words and figures following, that is to say,— [*199

"Time and place of meeting.

"I. That the first meeting of the society shall be held on Friday, the 3d of October, 1845, at the Girls' School Room of the Royal British Institution, Tabernacle Row, City Road, in the parish of St.

Luke, and county of Middlesex; and that the said society shall continue afterwards to meet on the first Friday in every succeeding month, at such place as the members may from time to time appoint, until the object of the society shall have been fully accomplished pursuant to these rules; and such meeting shall commence at seven o'clock in the evening precisely.

"Directors.

"VIII. That the entire management of this society shall be vested in twelve directors, six of whom shall retire annually, to be determined by ballot amongst themselves, but who shall be eligible to be re-elected.

"Subscriptions, and mode of payment.

"XXXII. That every person entering this society shall pay the sum of 2*s.* 6*d.* per share as entrance money: but the directors shall have full power to increase such entrance money from time to time as they may deem expedient.

"XXXIII. That every member of this society, on the first monthly meeting in October, 1845, shall then commence paying his or her subscription money or sum of 10*s.* per share for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money of 10*s.* per share, with all fines which may be due from him or her, at every succeeding *general or monthly meeting, until the objects of this society shall have been fully accomplished, such payments to be made between the hours of 7 and half-past 8 o'clock in the evening; and every member neglecting so to pay his or her subscriptions shall be fined for each subscription in arrear agreeably to the table of fines annexed. *Any member not having executed a mortgage to the society as hereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for six consecutive monthly nights, shall thereupon cease to be a member of the society, and forfeit all his or her interest therein.*

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"XXXIV. That, if any member shall be in arrear in respect of his or her subscriptions or fines for more than one general or monthly meeting, every payment afterwards made by such member shall be applied to the liquidation of the whole or the first part of such arrear, as the case may be.

"Members withdrawing.

"LXIV. That any person who shall be desirous of withdrawing from the society any share or shares which shall not have been purchased according to rule 38, shall be allowed to do so, on giving one month's previous notice in writing of such his or her intention to the manager at any general meeting of the society; and the money subscribed in respect of such share or shares shall be repaid to such member, subject only to the forfeitures next hereafter mentioned, that is to say, if application to withdraw shall be made within the first year

from the first meeting thereof, a forfeiture of 1*l.* 1*s.* per share in addition to the entrance fee; if within the second year from the said first meeting, a forfeiture of 10*s.* 6*d.* per share in addition to the entrance fee; and, if the application to withdraw be made within the third year from the holding the said first meeting, he shall take the net amount of subscriptions *paid, exclusive of entrance fee only: that, if the application to withdraw any such share or shares [*201 shall be made within the fourth or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the members so desirous of withdrawing, out of the profits which the society shall have realized, such bonus for the withdrawal of each share as they shall from time to time determine.

"LXV. That, if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice, or shall pay 5 per cent. on the amount received in advance, until they become entitled to receive by rotation. Provided always that the forfeitures hereby imposed shall not extend to widows and children of deceased members.

"LXVI. That in all cases of the withdrawal of shares from the society, subscriptions in arrear, and all fines incurred previously to any such application, shall be deducted from the amount which the member or members shall be entitled to receive.

"Fines to go to the general fund.

"LXXV. That the fines and all other payments that may be made by any member or members, or otherwise, save and except such fines as the directors may from time to time impose upon and amongst themselves, and on the manager, surveyor, and solicitor, to insure early attendance, shall be considered as part of the assets of the society, and shall be applied to the increase of the general fund.

"Termination of the said society.

"XCIX. That when the amount or value of 120*l.* shall have been realized for each share after all expenses and liabilities of the society have been fully paid and satisfied, the accounts shall be finally audited, printed, and sent to each member in manner hereinbefore mentioned, and this society shall terminate; and the *trustees shall, upon [*202 the authority in writing of the directors, signed by the chairman and attested by the manager, deliver up to each member, or his or her legal representative, the title deeds and other documents which shall have been deposited with them by such member as a security to this society, and shall and will, at his, her, or their request and expense, endorse on his or her mortgage and security a receipt for all the moneys intended to be secured thereby, pursuant to the 6 & 7 W. 4, c. 32, s. 5.

"Reference of disputes to arbitration.

"CII. That the directors for the time being shall determine all disputes which may arise respecting the construction of these rules, or any clauses, matters, or things therein contained, and also of any additions, alterations, or amendments of the same, which shall or may hereafter arise between the trustees, officers, or other members of this society; and the decision of the directors, if satisfactory, shall be final and conclusive; but, if not satisfactory, reference shall be made to arbitration, pursuant to 10 G. 4, c. 56, s. 27: and that, at the first meeting of the directors of this society after the enrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of this society: and that, in case all or any of the said arbitrators so to be appointed shall die or shall refuse or neglect or become incapable to act, the directors shall, at their then next meeting, name and appoint one or more arbitrator or arbitrators as aforesaid to act in the place of the said arbitrator or arbitrators so dying, or refusing, or neglecting, or being incapable to act as aforesaid; and that, in each case of dispute, the names of the arbitrators shall be written on pieces of paper, and placed in a box or glass, and the three whose names are first drawn by the complaining party, or by some one appointed by him or *203] *her, shall be the arbitrators to decide the matters in difference,"—as by the said rules, reference being thereunto had, will, amongst other things, appear. Averment, that, whilst the said rules were in full force, and before the said time when, &c., to wit, on the 1st of October, 1845, the plaintiff became and was a member of the said society, and the owner or holder of one share therein; and in respect thereof he the plaintiff from time to time paid to the said society divers subscription moneys and fines which became due and payable from him to the said society for and on account of his said share, pursuant to the said rule in that behalf numbered XXXIII: That the plaintiff never executed any mortgage to the said society]: *That, before the commencement of this suit, the plaintiff continued to neglect the payment of his monthly subscriptions payable by him to the said society in respect of his said share, for six consecutive monthly nights* which elapsed before the commencement of this suit, *and thereupon*, and before the commencement of this suit, *the plaintiff ceased to be a member of the said society, and forfeited all his interest therein* (including his aforesaid share, and all subscriptions, fines, and payments theretofore made in respect thereof), pursuant to the said rule of the said society in that behalf numbered XXXIII: And that the money claimed in the first count, except as to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., consisted entirely of subscription moneys and fines so paid by the plaintiff to the said society as aforesaid, and not of any other or different money.

Fourth plea,—to the first count, except so far as the same related to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c.,—that the matters alleged in so much of the defendants' third plea above pleaded, as commenced with the first word "that" [antè, p. 197] and ended with the words "never executed any mortgage to the said society" *[ante, p. 203], inclusive of such words, were true in substance and in fact, in manner and [*204 form as above alleged, and, to avoid prolixity, the defendants there repeated the same by reference as part of that plea: That, before the accruing of the supposed cause of action in the first count mentioned, and before and at the time of the commencement of this suit, five arbitrators had been and were duly elected and appointed pursuant to the said rule of the said society in that behalf, to wit, the said rule numbered CII: That none of the said arbitrators were or are beneficially interested, directly or indirectly, in the funds of the said society: That the money claimed in the said first count, except as to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., consisted entirely of subscription moneys and fines so paid by the plaintiff to the said society as aforesaid, and not of any other or different moneys: That the claim of the plaintiff in the said first count mentioned, except as to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., before and at the time of the commencement of this suit, was, and still remained, a matter in dispute between the plaintiff and the said society within the true intent and meaning of the said last-mentioned rule numbered CII; and that the said society, before the commencement of this suit, claimed, and still claimed, to retain the said moneys respectively under and by virtue of the rules of the said society thereinbefore set forth, or some or one of them; and the plaintiff, before and at the time of the commencement of this suit, disputed, and still disputed, such claim: That the said matter so in dispute as aforesaid, and the said claim of the plaintiff in respect thereof, ought to be referred to arbitration pursuant to the said rule numbered CII, and the statute in such case made and provided, and the same ought not to be recovered by action in this court: And that, after the accruing of the supposed causes of action in the said first count mentioned, *except as to the said sum of 4*l.* 6*s.* 6*d.*, parcel, &c., and after the said dispute in respect thereof, and before the [*205 commencement of this suit, the said society were ready and willing to refer the same to arbitration pursuant to the said rule numbered CII, and the statute in such case made and provided, whereof the plaintiff then had notice and well knew; but the plaintiff wilfully neglected and refused to join or concur in any such reference, and afterwards commenced this action.

The plaintiff joined issued on the defendants' first, second, and fourth pleas.

To the third plea he replied, that, in the said rules is a rule numbered IV, intituled "Trustees dying, resigning, &c.," and which contains the following words, "Provided always, that, in case of any trustee being

removed, and a new one appointed in his stead, such removal shall not operate to his prejudice as a member of this society so long as he shall think proper to conform to the rules thereof; and, upon such trustee or trustees' death, resignation, or removal by the members, all and every deeds, writings, and papers, and other property belonging to this society, in the custody or possession of such deceased, resigned, or removed trustee, shall be demanded by the chairman of the directors for the time being for and on behalf of the continuing and newly appointed trustee or trustees; and, if the same be withheld, or in case of refusal to transfer his estate and interest in any property given as security or mortgaged to this society, by the representatives of any such deceased trustee, or by such resigned or removed trustee, and the party or parties so withholding or refusing shall have been or shall be a member or members, he or they shall be expelled this society, and shall forfeit all the money he or they shall have paid to this society, and all interest or share of the assets thereof, and shall be compelled by all legal and equitable means to give up, *convey, assign, and transfer the same in such manner as the directors shall require,"—by which it appears that the term "interest" in the said rule numbered XXXIII was not intended to include, and did not and does not include, the subscriptions and moneys paid by the member to the said society.

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The defendants, as to the replication to the third plea, admitted, that, in the said rules was a rule numbered IV, intituled "Trustees dying, resigning, &c.," and which contained the words in that behalf set out in the said replication; and they joined issue upon the residue of the said replication.

The cause came on for trial before Crowder J., at the second sitting at Westminster in Trinity Term last, when a verdict was found for the plaintiff for 35*l.*, less 4*l.* 6*s.* 6*d.* money brought into court upon the first plea, which was found for the defendants, subject to the opinion of the court on the following case:—

The defendants are the trustees of the Guardian Building Society and Accumulating Fund, which is a benefit building society established under and by virtue of the 6 & 7 W. 4, c. 32, intituled "An act for the regulation of building societies;" and all the rules, orders, and regulations under which the said society is governed have been and are duly and according to law, and the statutes in such case made and provided, certified, enrolled, exhibited, allowed, confirmed, and filed: and the society is entitled to the benefit of the said statute of 6 & 7 W. 4, c. 32, and other the statutes for the regulation of building societies.

The plaintiff was a member of the society to the extent of one share. The share originally belonged to one George Clark, who transferred it to the plaintiff on the 6th of November, 1847. From the time of the transfer up to and until the month of February, 1851, inclusive,

the plaintiff paid his monthly subscription money of 10*s*. *per share; and the whole of such payments by the plaintiff to the [*207 said society, from the time of the commencement of the said society to the time of the plaintiff's making default as hereafter mentioned, amounted to 35*l*.

From the month of March, 1851, and for seven consecutive months, that is, to September, 1851, inclusive, the plaintiff made default in payment of his monthly subscription to the said society in respect of the said share he held therein.

The plaintiff has not executed any mortgage to the said society.

On the 5th of September, 1851, the plaintiff caused to be tendered at the monthly meeting night held on the 5th of September, 1851, his subscriptions for the respective months of March, April, May, June, July, August, and September, and the fines due on account of the non-payment of the said several subscriptions respectively, in the whole amounting to 4*l*. 6*s*. 6*d*.; and the said sum of 4*l*. 6*s*. 6*d*. was received of and from the plaintiff on account of his said subscriptions and fines, by two of the directors of the said building society on the rota for that evening, and attending and acting under the 20th rule of the said society, and being the only directors present; and receipts were signed for the said several subscriptions and fines, and then delivered to the said plaintiff. [The receipts were set out.]

On the 23d of September, being the first meeting of the directors after the 5th, the receipt of the subscriptions and fines was discussed; and the following resolutions were come to:—"Resolved, firstly, that Mr. Card, having allowed his subscription to become six months in arrear, such period expiring at the meeting in August last, did at that meeting cease to be a member of this society, and forfeited all his interests therein; and this court do hereby direct the manager to erase Mr. Card's name from the list of members. Secondly, that the *solicitor be directed to wait upon Mr. Card, communicate to him [*208 the foregoing resolution, and return to him the 4*l*. 6*s*. 6*d*. taken by the directors at the September meeting; the said directors having informed the board that the money was received in ignorance of the stringency of the rule. Thirdly, that the directors appointed to receive the subscriptions at the October meeting be instructed to refuse to receive any money from Mr. Card, should he attend and offer to pay the subscription on the said share so forfeited as aforesaid."

It was objected on the part of the plaintiff, that these resolutions ought not to be admitted to be read in evidence against him. But they were admitted by the learned judge, after evidence given that the plaintiff was informed that such resolutions had been made, and that, in pursuance therof, the solicitor had communicated the same to him, and had tendered to him the sum mentioned in the resolutions; which tender was admitted.

The day after these resolutions passed, Mr. J. Wright, the attorney of the said building society, called on the plaintiff, and stated that the directors on the rota had made a mistake in receiving the said sum of 4*l.* 6*s.* 6*d.*, the share having been previously forfeited. The said Mr. Wright, on behalf of the said society, then tendered and offered to pay to the plaintiff the said sum of 4*l.* 6*s.* 6*d.* paid to the said society by the plaintiff; but the plaintiff declined to receive the same.

On the 15th of January, 1853, the plaintiff wrote to the manager of the society, as follows:—

"Sir,—Claiming to be a member of the Guardian Building Society, of which you are secretary, it is my intention to establish that claim before the directors of such society at the earliest period. I therefore request you to inform me when next the directors meet, in order that the matter in dispute may be brought before them agreeably to rule 102."

*209] *On the 16th of February, 1853, the plaintiff, not having received any answer to that letter, wrote and sent to the manager of the said society the following notice:—

"Take notice, that I, the undersigned, claim to be a member of the Guardian Building Society, of which you are secretary; and that claim being disputed by the executive of that society, I demand, agreeably to the rules of that society, arbitration to be appointed at the earliest opportunity, in order that I may endeavour to establish my claim to such membership. And take further notice that I also claim and demand the return of all moneys paid by me to such said society; and that I shall be satisfied with the decision which such arbitrators shall come to, either as to my being a member or as to the return of money paid by me as aforesaid; and the result of such decision shall be considered by me as final."

The plaintiff received no answer to this notice; and, on the 3d of March, 1854, he again wrote to the directors of the society, as follows:—

"I beg once more to call your attention to my case, having frequently made application to Mr. Thomas (the manager) for the investigation of my claim for my restoration as a member of the building society, and having been frequently told by that gentleman that I had forfeited all claim on the society. I now venture, as a last resource, to address you on the subject. A few years ago, I was admitted a member; and, after having paid in a large sum of money, I by accident omitted to pay my subscriptions for six consecutive months; but, on the seventh monthly night, I sent the whole of my subscription, together with the fines, which was accepted by the society; and my messenger was then told to inform me, that, if I again neglected for six consecutive months, I should be

*210] erased, and forfeit all claims on the society or *its funds. A few days after such payment, a gentleman called on me, stating, my last money was taken by mistake, that I had been expelled, and that

I could have my last money paid returned to me; and, thinking it was not a fair proposition, I declined to make application for the same. My opinion as to the unjust expulsion continues the same; and (if consistent with your rules) I am now satisfied to abide the decision of arbitrators, whether I am or not to be a member, upon the payment of all arrears up to the present time."

On the 7th of April, 1854, the plaintiff received from the manager of the society the following letter:—

"Sir,—I am instructed by the directors of the Guardian Building Society to acknowledge the receipt of your letter of the 8d ultimo, and to refer you to the printed rules on which the society was established and is conducted, and which in their judgment fully answer your application. "JAMES WRIGHT, Manager."

All the letters set forth in this case were written and posted on the days on which they are dated, and were all received in due course of post.

The defendants did not at any time offer to refer the said dispute to arbitration, although the plaintiff was always ready to have the same referred to arbitration, and informed the directors thereof; but they refused the arbitration; and there was no evidence that the plaintiff took any other steps as to the arbitration.

A book containing the rules of the said society accompanied the case, and it was agreed by both parties that the court should be at liberty to refer to the contents of the said book, as if they were part of the case, and fully set out in it.

The court was to draw such inferences from the facts and documents stated in the case as a jury ought to have drawn.

*The question for the opinion of the court was,—Whether the plaintiff was entitled to recover the said sum of 35*l.*, less 4*l.* 6*s.* 6*d.*, paid by the plaintiff to the said society as his subscription to the said society from the commencement of the said society until the time of his making default, as stated above, or any part thereof. [*211

If the court were of opinion that the plaintiff *was* entitled to recover the sum of 35*l.*, less 4*l.* 6*s.* 6*d.*, or any part thereof, the verdict entered for the plaintiff was to stand for so much as the court might think the plaintiff entitled to recover. If the court were of a contrary opinion, a nonsuit was to be entered.

In the event of the court being of opinion that the plaintiff was entitled to recover anything, the court was to direct how the verdict was to stand upon the several issues joined between the parties.

Edward James, Q. C., for the plaintiff. [CRESSWELL, J.—Is the plaintiff a member of the society or not?] In the first instance he was improperly expelled: but, once expelled, he was entitled to treat himself as no longer a member. [CRESSWELL, J.—If you insist that he is *not* a member, where is the evidence of his expulsion?] If you say he

is a member, how can he sue?] The party does not ipso facto cease to be a member, by virtue of the 33d rule, by neglect to pay his monthly subscriptions for six consecutive monthly nights. Something must first be done. The directors might waive their right to take advantage of his default: and this they have done, by receiving the money after the forfeiture was incurred. [CRESSWELL, J.—The statement is, that the money was received by the two directors in ignorance of the stringency of the rule. There was evidently no intention on their part to waive the forfeiture, even if they had power to do so.] They were bound to have knowledge of the rule. [CROWDER, J.—But, could they waive a *212] forfeiture?] The *general management of the society is vested in the directors. [*Atherton.*—The 26th rule empowers *five* directors to act: the case states that *two* only were present when that was done which is relied upon as a waiver of the forfeiture.] The presence of five directors was not essential to the receipt of money: and the waiver of a forfeiture by receipt of the subscriptions clearly would be within the province of those who were intrusted by the directors to receive subscriptions and fines. [CROWDER, J., referred to The British Industry Life Assurance Company, App., Ward, Resp., 17 C. B. 644 (E. C. L. R. vol. 84), where it was held that an agent to receive money on behalf of the company, had no authority to waive a forfeiture, or to make a new contract for the company.] That case is hardly consistent with Wing *v.* Harvey, 5 De Gex, M'N. & G. 265, before the Lords Justices. A life policy was subject to a condition making it void if the assured went beyond the limits of Europe without license: an assignee of the policy, on paying the premium to a local agent of the society at the place where the assurance had been effected, informed him that the assured was resident in Canada: the agent stated that this would not avoid the policy, and received the premiums until the assured died: and it was held, that the society were precluded from insisting on the forfeiture. Lord Justice Knight Bruce there says,—"If the directors, represented by the defendant, had themselves personally received the premiums which Mr. Lockwood received, with the same knowledge that he had, there certainly would have been a waiver of the forfeiture, and the defence in this case would have been ineffectual. But he was their agent for the purpose of receiving premiums at least on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual notwithstanding Mr. Bennett's departure *213] for Canada, and residence there,—a faith in *which Mr. Lockwood knowingly acquiesced, and to which he expressly acceded. The premiums thus paid having been transmitted by Mr. Lockwood from time to time to the directors, and retained by them without objection, I think that, whether Mr. Lockwood informed or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became, and that they are, as between them

and the plaintiff, as much bound as if he had paid the premiums directly to themselves, they knowing at the time on each occasion the place of Mr. Bennett's residence. The directors, taking the money, were and are precluded from saying that they received it otherwise than for the purpose and in the faith for which and in which Mr. Wing expressly paid it." [CRESSWELL, J.—He seems to have considered the office affected with notice.] But he treats that as immaterial. [CRESSWELL, J.—If you introduce into that case the fact which appears here, that the directors, immediately upon being made acquainted with the circumstances, repudiated the payment and their liability, would the Lords Justices have held the society liable?] The facts of the two cases, it is submitted, are as nearly parallel as possible. The directors, who must be assumed to be cognisant of all the facts, do not declare the plaintiff's interest forfeited until they have received the money. It clearly was not competent to them afterwards to elect to treat the omission to pay as a forfeiture: Hyde *v.* Watts, 12 M. & W. 254.† The case is analogous to those of conditions waived between landlord and tenant: Doe d. Bryan *v.* Bancks, 4 B. & Ald. 401. [WILLIAMS, J.—That matter was very much discussed in Doe d. Gatehouse *v.* Rees, 4 N. C. 384 (E. C. L. R. vol. 33), 6 Scott, 161.] Although the directors could not properly exclude the plaintiff from the society after having so waived the forfeiture, still, as they have assumed to do so, he is entitled to adopt their act of exclusion, and to bring this *action. [*214 The jurisdiction of the court clearly is not ousted by the arbitration clause,—rule 102. Clear and distinct words are necessary for that purpose. If the plaintiff had applied for a mandamus to compel the directors to appoint arbitrators, he would have been met by the objection that he had ceased to be a member of the society. In Morrison *v.* Glover, 4 Exch. 430,† it was held that a rule of a building society requiring disputes between the society and any member thereof to be referred to arbitration, pursuant to the 10 G. 4, c. 56, s. 27 (incorporated with the 6 & 7 W. 4, c. 32), applies only to matters in dispute between the society and any member *as member*. The subject was also under discussion in Cutbill *v.* Kingdom, 1 Exch. 494.† By the 1st section of the 6 & 7 W. 4, c. 32, all fines are to be reasonable. Now, it clearly is not reasonable to provide that a member shall forfeit his rights, where nearly the whole subscription has been paid up, for one default.

Atherton (with whom was *Joyce*), contrà, was stopped by the court.

CRESSWELL, J.—This appears to me to be a very plain case. By the 33d rule of the society, it is provided that any member not having executed a mortgage to the society, as thereinafter mentioned, continuing to neglect the payment of his monthly subscriptions for six consecutive monthly nights, *shall thereupon cease to be a member of the society, and forfeit all his interest therein.* It is said, that that rule does not ope-

rate a forfeiture, until there has been a declaration of the forfeiture by a meeting of the directors; and that, before such declaration of forfeiture took place in this case, the forfeiture had been waived by the acceptance of the money. It seems to me, however, that there is no
*215] evidence of a waiver. The two directors who received the *money on the seventh monthly night, had no authority to waive the forfeiture: and the moment the money was handed over to the directors, it was returned and the transaction repudiated. The defendants are clearly entitled to judgment.

WILLIAMS, J.—I am of the same opinion. I think there is not the slightest pretence for saying that there is anything unreasonable or contrary to law in the rule in question.

CROWDER, J., concurred. Judgment for the defendants.

In the Matter of SARAH GARDNER. *Nov.* 15.

Upon a motion to dispense with the husband's concurrence in a deed for the conveyance by the wife of her separate property, the affidavit must contain the addition or description of the husband.

KINGDON, on a former day in this term, moved for a rule to enable Sarah Gardner, a married woman, whose husband had deserted her in the year 1846, and of whose residence or existence she was ignorant, to convey her interest in certain property, without his concurrence.

The affidavit was objected to by the Master, on the ground that it contained no addition or description of the applicant's husband.

The motion was now renewed upon an amended affidavit, and

Granted.

216] *In the Matter of a Plaint in the County Court of WORCESTER holden at STOURBRIDGE, between MEREDITH and WHITTINGHAM and Others. *Nov.* 7.

A friendly society enrolled its rules in 1832, under the 10 G. 4, c. 57, and shortly afterwards framed new rules, which were never enrolled or certified.

In an action in the county court, by a member against the stewards for sick pay,—Held, that the society was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63. s. 2; and, consequently, that the county court had jurisdiction, under the 41st section of that act.

A PLAINT was levied in the Stourbridge county court at the suit of Meredith against the stewards of a society called The Seven Stars Friendly Society, under the circumstances stated in the following judgment which was delivered by the judge of that court on the 27th of October last:—

"The plaintiff sought to recover 18s., for three weeks' pay, from the stewards of a society called The Seven Stars Friendly Society, enrolled on the 4th of January, 1832, and certified by the proper officer on the 24th of February in the same year, and again certified by the registrar on the 5th of September last, according to the provisions of the 18 & 19 Vict. c. 63, s. 26.

"On the 18th of December, 1832, the society framed new rules, which have never been enrolled or certified, nor acted upon until recently, and consequently could not be read in evidence.

"The plaintiff claimed for sick pay under the original rules which were certified, and gave evidence of his sickness and compliance with such rules.

"For the defendants it was contended that the original rules were no longer in existence, by reason of their not being acted upon for a long series of years; and The Queen *v.* Lord Godolphin, 8 Ad. & E. 338 (E. C. L. R. vol. 35), 3 N. & P. 488; and Ex parte Norrish, Jacob, 162, were cited. The cases so relied on are, however, in direct opposition to the defendants' view of the question. If there were any doubt upon the subject, it is removed by s. 27, of the 18 & 19 Vict. c. 63, which directs in what *manner the old rules may be altered [*217 or rescinded. The 2d section declares that every friendly society held under former acts (now repealed) shall still be subsisting; and the 3d section provides that the rules of any subsisting society, which have been confirmed or certified under the repealed acts, shall be valid until the same shall be altered by s. 27, before referred to. Now, in this case, the society cannot be subsisting under rules which have never received the sanction of law, but it is still subsisting under those rules which have been duly enrolled and certified.

"For these reasons, I find for the plaintiff, for the sum claimed by him."

R. Kettle now moved for a prohibition, to prohibit the judge of the county court from further proceeding in the matter of the plaint, on the ground that that court had no jurisdiction, inasmuch as the society in question was not a subsisting friendly society within the meaning of the 2d section of the statute 18 & 19 Vict. c. 63. The affidavit upon which the motion was founded, stated, that in January, 1832, the society was enrolled, and its rules duly certified by the proper officer in February; and that, in December in the same year, those rules were altered; but that the altered rules had never been certified. The question is, whether this did not operate as an abandonment of the old society; the object of the present application being to resolve the doubt suggested by Lord Denman in the case of The Queen *v.* Godolphin, 8 Ad. & E. 338 (E. C. L. R. vol. 35), 3 N. & P. 488. In that case a friendly society enrolled its rules in 1794, under the statute 33 G. 3, c. 54: in 1804, alterations were made in them, but, by a neglect

for which the society was not to blame, the altered rules were never enrolled: they were, however, acted upon, and the original ones dis-
*218] used, till 1835, when the omission to enrol *was for the first time discovered. Upon a motion for a mandamus to justices to hear the complaint of a member who had been expelled in 1836, it was held,—first, that the rules as altered could not legally be acted upon,—secondly, that it was at least doubtful whether the original rules continued in force, and, consequently, that the court could not issue a mandamus to the justices, but must leave the applicant to his remedy in equity. The court, in giving judgment, say: "We are aware of the extreme inconvenience of putting the claimant in the present case to seek his relief in a court of equity: but, with the authority of Ex parte Norrish before us, and the serious doubts (to say no more) which we entertain whether the magistrates have the jurisdiction which the writ would command them to exercise, we should violate our well-established rules if we were to make the rule absolute; and, whatever may be the amount of inconvenience in the particular case, we perhaps do that which is more than proportionably convenient in general, if, by discharging the rule, we cause it to be generally understood that these societies cannot depart from their established rules, or neglect to comply with the statute in the mode of altering or repealing them, without exposing their property to danger, and themselves to great expense, loss, and inconvenience." [CRESSWELL, J.—The 41st section enacts, that, "in all friendly societies established under this act or any of the said repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application
*219] has been made by the *member or person claiming through or under a member or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal." That seems to me to give the county court the same powers which Lord Denman thinks the court of equity had.] The word "subsisting" evidently was intended to override the whole clause. [CRESSWELL, J.—

Would the alteration of a single rule make the society cease to exist?] The alteration of the rules was an abandonment of the society.

CRESSWELL, J.—I am of opinion that this is a subsisting society. The legislature has left it to the decision of the county court judge.

The rest of the court concurring,

Rule refused.

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*CHARLES BAYNTUN *v.* The Rev. HENRY BAYNTUN, Clerk. *Nov.* 20. [*220

Non-performance of a condition contained in a rule of court, is no ground for an application to rescind it.

ON the 13th of April, 1852, the defendant made his promissory note for 1000*l.* payable four months after date to the plaintiff or order, and handed the same over to the plaintiff in trust for the separate use of his (the defendant's) daughter Lucy Ann, the wife of Alexander Sinclair Wiseman. This note was delivered to the plaintiff accompanied by the following memorandum:—

"Major Charles Bayntun,—In consideration of the natural love and affection I bear to my daughter Lucy Ann Wiseman, I have this day signed and delivered to you, as trustee for my said daughter, my note of hand, dated this day, for the sum of 1000*l.*, payable four months after the date thereof; such note, and the proceeds thereof when received, to be appropriated for the sole and separate use of my said daughter, free from the debts, engagements, and control of her present or any future husband. Dated this 13th day of April, 1852."

The 1000*l.* note being unpaid, an action was brought upon it on the 7th of December, 1853; and on the 4th of October, 1854, a judge's order was obtained by consent, for payment of the amount of the bill, with interest from the 16th of August, 1852, and costs; and on the 6th of October judgment was signed, and a fi. fa. issued, which, being returned nulla bona, was followed by a writ of sequestrari facias, under which the Bishop of Salisbury duly sequestered the rents, tithes, and charges, oblations, obventions, fruits, issues and profits of the rectory and parish church of Bromham, in the county of Wilts.

On the 12th of October, 1854, the defendant by deed conveyed to his son Mortimer Bayntun and one John *Lister all his estate and effects, upon trust to pay and secure to the defendant a [*221 clear income of 300*l.* per annum, then to pay annuities of 50*l.* per annum to each of his five children, and then to apply the surplus trust funds in the discretion of the said trustees to and amongst the defendant's said children.

On the 21st of October, 1854, an order was made by Maule, J., in this cause, as follows:—

"Upon hearing the attorneys or agents on both sides, and by consent, and upon reading the judgment signed herein, dated the 6th of October instant, for 1000*l.* debt, with interest thereon from the 16th of August, 1853, at the rate of 5*l.* per centum per annum, and 5*l.* 7*s.* 6*d.* costs; and upon reading the writ of sequestrari facias issued upon the said judgment upon the tithes and income of the defendant as rector of Bromham, in the county of Wilts, amounting annually to 450*l.* or thereabouts, generally paid over to the said defendant every October; and the said parties, by their respective attorneys, having consented that the gradual payment and satisfaction of the said judgment-debt, by them agreed at 1154*l.* for principal, interest, and costs, to the date of the said judgment, and its future interest at 4*l.* per centum per annum from the date of the said judgment, which shall be and remain in full force and effect for securing the due payment of the said 1154*l.*, and that such judgment and writ of sequestrari facias shall be limited to securing the annual payment of 200*l.* out of its entire annual produce, to the above-named plaintiff, until the whole of the said 1154*l.*, with future interest as aforesaid, shall be fully paid and satisfied: I do order that the sequestrator shall pay over to Mortimer Bayntun and John Liston, the trustees of the said defendant, annually, all surplus receipts beyond the said annual payment to the plaintiff of 200*l.*,—the first payment of 150*l.* only as agreed to be made and paid to the plaintiff *or his attorney by the sequestrator on or before the 31st day of October instant, or so soon afterwards as the same can be received by the sequestrator: And, in consideration of the plaintiff having agreed that such residue of the defendant's rectorial income shall be paid over to the said trustees as aforesaid, I do order that he, the defendant, shall, out of the other sources of his income, pay or cause to be paid to the said plaintiff or his attorney on or before the 20th of January next the further sum of 100*l.*, also on the 30th of July next the further sum of 50*l.*, also on the 30th of October next the further sum of 100*l.*, and the like further sum of 100*l.* on every then subsequent 30th of January and 30th of October until the said judgment-debt or sum of 1154*l.*, and its future interest at 4*l.* per cent., shall be fully paid and satisfied: And I further order, that, on the defendant paying to the plaintiff or his attorney 100*l.* in each succeeding January, the sequestrator is only to pay to the plaintiff 100*l.* every October, and the residue of all tithes, &c., to the defendant's said trustees."

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On the 5th of January, 1855, the above order was made a rule of court.

In November, 1854, a payment of 150*l.* was made by the sequestrator to the trustees; in November, 1855, a further payment of 250*l.*; and, in April, 1856, a further payment of 100*l.*, in part reduction of

the judgment-debt, interest, and costs, leaving a balance due thereon of 724*l.* 10*s.* or thereabouts.

Upon affidavits disclosing the above facts, and stating that no other payments had been made by or on behalf of the defendant out of other sources of his income other than the income arising from his said parish church and rectory, pursuant to the said rule of court,—that the current year's net produce of tithes and other rights from the said rectory and parish church of Bromham, amounting to 400*l.*, was then, or forthwith would be, in *the hands of the sequestrator,—and that the sequestrator and his deputy had refused to pay out of the defendant's said rectorial income more moneys than at the rate of 200*l.* per annum towards satisfying the said judgment. [*223

Piggott, Serjt., on behalf of Lucy Ann Wiseman, now moved for a rule to show cause why the rule of the 5th of January, 1855, should not be rescinded, or why the sequestrator should not pay over to the plaintiff the year's tithes now due, on the ground that the terms of the rule had not been complied with. He submitted, that, unless the rule were rescinded, the plaintiff's remedy for the recovery of the balance of the judgment-debt would be lost. [WILLIAMS, J.—Why not enforce the order in the usual way?] The defendant has divested himself of all his property. [CRESSWELL, J.—By the terms of the order, the 200*l.* a year which by the former part was to be paid by the sequestrator, was to be reduced to 100*l.* provided the defendant paid 100*l.* a year at certain times. If he failed to pay it, the former part was to be operative,—the sequestrator was to pay 200*l.* a year. How can you ask us to rescind the agreement?] At all events, the applicant is entitled to receive from the sequestrator the whole surplus profits, unless the conditions imposed by the rule are complied with. [WILLES, J.—Is not the proper remedy by a second sequestration, under the 1 & 2 Vict. c. 110, s. 18? CRESSWELL, J.—Do you find any instance of an order upon a sequestrator to pay over money which he has not yet received? You do not complain of a violation of duty on his part. This, therefore, is a mere quia timet application. You fear that he will violate that rule, although the conditions have not been complied with. Is that such a rule as we can grant?] The money is due and payable; and it is sworn *that the sequestrator has declared that he will not pay more than the 200*l.* a year. [*224

CRESSWELL, J.—I am of opinion that there is no ground for this rule. We cannot rescind the rule of court, because one party has failed to perform a part of it. Neither can we grant the quia timet alternative asked for.

WILLIAMS, J.—I am of the same opinion. The application in effect seeks to rescind the rule, because it has been violated.

The rest of the court concurring, Rule refused.

*225] *VORLEY v. BARRETT. *Nov.* 7.

A., B., and C. respectively drew, accepted, and endorsed a bill for 300*l.* for the accommodation of D. B. having paid the amount of the bill to the holder at maturity, sued A. (his co-surety) for contribution. A. pleaded, that, after the drawing, acceptance, and endorsement of the bill, and before it became due, D. became bankrupt, and after B. had so paid the bill, he agreed with the assignees of D., that, in consideration of their delivering up to him a certain building agreement then subsisting between him and D., he (B.) would pay them 150*l.* *and would relinquish* (amongst other things) *all moneys advanced to and for D., to wit, the* 300*l.* *so paid in satisfaction and discharge of the bill;* that this agreement was fully performed; and that thereby, and without the consent of A., D. and his estate were exonerated from the claim.

To this plea, B. replied "on equitable grounds," that the bill was drawn, accepted, and endorsed, and the amount paid by him, as alleged in the plea; that, before the bankruptcy of D., he had advanced him moneys to the amount of 2661*l.* 6*s.* 6*d.* to assist him to build certain houses pursuant to the terms of the building agreement mentioned in the plea, and had sold him timber and materials for the same purpose to the amount of 1512*l.*; that D. being so indebted to him in the sums above mentioned, and also in the sum of 300*l.* so paid by him in discharge of the bill, and in 136*l.* 17*s.* 4*d.* for moneys advanced to him for other purposes, it was agreed between him and the assignees of D. that the building agreement should be delivered up to him to be cancelled on his paying them 150*l.* in discharge of all claims which they might have on the houses and property comprised in the building agreement, and that he should relinquish all claim on the estate of D. for the moneys advanced by him to D. for the purpose of the erection of the said houses, and for the materials so supplied as aforesaid, but that such agreement did not extend to the 300*l.* paid in discharge of the bill, nor to the 136*l.* 17*s.* 4*d.*; that, with a view to putting that agreement into writing, the following memorandum was drawn up:—"It is hereby agreed between the assignees and B., as follows: that the building agreement for eighteen houses on land in, &c., be given up to B. to be cancelled, on payment by him to the assignees of 150*l.* in full for all claims they may have on the property; B. hereby relinquishing all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above-mentioned houses,"—that the memorandum was signed by him (B.) and the solicitors of the assignees in the belief that it was in conformity to the agreement so made as aforesaid; and that the same was worded as aforesaid by mistake and error, so as to include and relinquish his claims against D. and his estate on account of the 300*l.* paid by him (B.) in discharge of the bill, contrary to the true intention of B. and the assignees when they signed the memorandum; that B. never relinquished or gave up his said last-mentioned claim against D. and his estate, nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the memorandum so executed in error as aforesaid; and that the real and true agreement so made between B. and the assignees as aforesaid, *was in all respects performed and fulfilled* by the said parties thereto:—

Held, that the replication disclosed a good answer "on equitable grounds" to the plea,—whether the written memorandum did or did not include the claim for the 300*l.*; for, that the defendant, by demurring to the replication, admitted, that, if it did not include that claim, it did so by mistake; and, *the agreement having been executed*, this court was bound to grant the plaintiff the same relief that the plaintiff would have been entitled to in equity, without compelling him to resort to a court of equity to reform it.

A replication "on equitable grounds" may be a good legal as well as equitable answer to a legal plea: but, where the plea is pleaded "on equitable grounds," the replication must also be considered on equitable grounds.

THIS was an action for money paid, money lent, and money found due from the defendant to the plaintiff on accounts stated.

*226] *Second plea,—as to 100*l.*, parcel of the money claimed,—that the said sum of 100*l.* was and is the third part of a sum of 300*l.* paid by the plaintiff in satisfaction and discharge of a bill of exchange dated the 10th of January, 1854, drawn by the plaintiff on and accepted by William John Watson, payable to the order of the plaintiff three months after date, and endorsed by the plaintiff, and

by the defendant, and one George Kent, respectively, and which bill of exchange the plaintiff and the defendant and the said George Kent respectively so drew and endorsed respectively for the accommodation of and as sureties for the said William John Watson, and which the defendant and the said George Kent so endorsed respectively at the request of the plaintiff: That, after the drawing, acceptance, and endorsement of the said bill as aforesaid, and before the same became due, the said William John Watson became and was a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts; and such proceedings were thereupon had, that certain persons were duly appointed and became and were the assignees of the estate and effects of the said William John Watson as and being such bankrupt as aforesaid: That thereupon afterwards, and after the plaintiff had so paid, satisfied, and discharged the said bill as aforesaid, to wit, by payment of the amount thereof to John Garland, the lawful holder thereof, and before this suit, an account was had and stated by and between the plaintiff and the said assignees, as and being such assignees as aforesaid, and it was, without the defendant's privity or consent, then agreed by and between the plaintiff and the said assignees, as and being such assignees as aforesaid, that, in consideration of the said assignees, as and being such assignees as aforesaid, delivering up to the plaintiff to be cancelled a certain building agreement in writing, which had been before then entered into and was then subsisting, by and between *the plaintiff and the said William John Watson, the plaintiff should pay to the said assignees, as such assignees as [*227 aforesaid, 150*l.*, and would relinquish (amongst other things) all moneys advanced to and for the said William John Watson, *to wit, the said money so paid by the plaintiff in satisfaction and discharge of the said bill:* That, before this suit, the last-mentioned agreement was fully performed by the said parties thereto respectively, and the said assignees, as and being such assignees as aforesaid, delivered up to the plaintiff to be cancelled the said agreement in writing, and the plaintiff then wholly relinquished and gave up his last-mentioned claim according to the true intent and meaning of the said agreement, and the said claim thereby became and was satisfied and discharged, and the said William John Watson and his estate and effects became and were wholly exonerated therefrom: And that the defendant did not at any time consent to, ratify, or confirm the said agreement.

Replication "on equitable grounds,"—That, one William John Watson, being in debt to a large amount to several persons, and being in want of a sum of 300*l.* for the purpose of paying certain of his creditors an instalment of their debts, and obtaining time from them to pay the remainder thereof, applied to the plaintiff, the defendant, and the said George Kent, to assist him the said William John Watson in raising the said sum of 300*l.* for the purpose aforesaid; and thereupon

the plaintiff, the defendant, and the said George Kent, at the request of the said William John Watson, and for his accommodation, mutually agreed together to assist the said William John Watson, by each of them advancing him or raising for his use the sum of 100*l.*, making 300*l.* in the whole, and to effect the same by becoming parties to a bill of exchange for the sum of 300*l.*, to be negotiated for the purpose of raising the said sum of money for the use and benefit of the said William John Watson for the *purpose first aforesaid, he the said William John Watson providing for the payment of the said bill when it had become due; and, in pursuance of such agreement, and for no other consideration, the defendant afterwards, to wit, in December, 1853, made and drew on the plaintiff a bill of exchange for the sum of 300*l.* payable at one month after date to the defendant's order, and, in further pursuance of the said agreement, and for no other consideration, the said bill was afterwards accepted by the plaintiff, and endorsed by the defendant to the said George Kent, and by him to one John Garland, who discounted the same for the use and benefit of the said William John Watson, to assist him in raising the said sum of 300*l.* for the purpose first aforesaid; and, whilst the said John Garland continued the holder of the said bill, and when the same became due, the said William John Watson not being prepared to pay the said bill, as he ought to have done, the said John Garland, at the request of the plaintiff, the defendant, and the said George Kent, agreed to renew the said first-mentioned bill for three months, and, for the purpose of effecting such renewal, and for no other consideration, the plaintiff then drew on the said William John Watson another bill of exchange for 300*l.*, dated the 10th of January, 1854, payable to the plaintiff's order at three months after date, and the said William John Watson accepted the same, and, for the same purpose, and for no other consideration, the plaintiff and the defendant and the said George Kent respectively endorsed the said bill, and delivered the same so endorsed to the said John Garland, who took and accepted the same as and for a renewal of the said first-mentioned bill at one month's date, and for no other consideration: That the said bill of the 10th of January, 1854, was the same as the bill of that date mentioned in the said second plea, and that the drawing and the several endorsements thereof aforesaid were the same drawing and endorsements *thereof in the said second plea mentioned, and that the same was not endorsed by the defendant and the said George Kent at the request of the plaintiff, or otherwise than as above mentioned: That, after the said bill of the 10th of January, 1854, became due and was dishonoured by the said William John Watson, and after he became bankrupt, the plaintiff was called on and obliged to pay, and did pay, the amount thereof, to wit, 300*l.*, to the said John Garland, as the holder thereof, in discharge of the said bill, as in the said second plea

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mentioned, whereby the defendant became liable to pay and contribute to the plaintiff one-third of the said sum of 300*l.*, the said William John Watson not having paid any part thereof, and being unable to pay the same: That, before the said William John Watson became bankrupt as in the said plea mentioned, the plaintiff had advanced divers large sums of money to and for the said William John Watson, to wit, to the amount of 2661*l.* 6*s.* 6*d.*, for the purpose of assisting him to build certain houses and other premises at Holloway, pursuant to the terms of the said building agreement in the said second plea mentioned, and had also sold and supplied to the said William John Watson divers quantities of bricks and other materials for the same purpose, of great value, to wit, of the value of 1512*l.*; and the said last-mentioned moneys, bricks, and materials had been principally expended and used by the said William John Watson in and about building the said houses and premises at Holloway, pursuant to the terms of the said building agreement: That, before and at the times of making the agreement with the assignees of the said William John Watson thereinafter mentioned, the said William John Watson was indebted to the plaintiff, not only in the amount of the said moneys so advanced and bricks and materials sold and supplied by the plaintiff as aforesaid for the purpose of assisting the said William John Watson to erect and build the said houses and *premises at Holloway pursuant to the said building agreement as aforesaid, but also in the said sum of [*230 300*l.* so paid by the plaintiff in discharge of the said bill as aforesaid, and also in a further sum of money, to wit, 136*l.* 17*s.* 4*d.* for other moneys lent by the plaintiff to the said William John Watson, and paid by the plaintiff to and for the use of the said William John Watson, for other and different purposes than those above mentioned, at his request, and for interest due from him to the plaintiff thereon: That, the said William John Watson being so indebted to the plaintiff, it was agreed between the assignees of the estate and effects of the said William John Watson under his said bankruptcy and the plaintiff, that the said building agreement in the said second plea mentioned should be delivered up to the plaintiff to be cancelled, on payment by the plaintiff to the said assignees of 150*l.* in full discharge of all claims which they might have on the houses and property comprised in the said agreement, and that the plaintiff should relinquish all claims on the said bankrupt, or his estate, for the said moneys which had been so advanced by the plaintiff to and for the said bankrupt as aforesaid for the purpose of assisting him to erect and build the said houses and premises at Holloway pursuant to the said building agreement as aforesaid, and for the said bricks and materials which had been so sold and supplied by the plaintiff to the said William John Watson as aforesaid for the purpose aforesaid; but that such agreement did not extend to the said sum of 300*l.* so paid by the plaintiff in discharge of the said bill as aforesaid, or any part

thereof, nor to the said other moneys due to the plaintiff as aforesaid for moneys lent and paid to and for the use of the said William John Watson for other and different purposes as aforesaid, with interest thereon: That the plaintiff and the said assignees, being desirous of putting the said agreement between them into writing, respectively *231] *employed their respective solicitors for the purpose of preparing a memorandum in writing to be signed by the plaintiff and by the said assignees, or their solicitors, in conformity with the agreement so come to between them as aforesaid; and that thereupon the respective solicitors of the plaintiff and of the said assignees, being so employed, and with intent to put in writing the agreement so made as aforesaid, drew up and prepared for signature by the said parties a written memorandum of agreement, in the words and figures following,—"In re Watson. Memorandum. It is hereby agreed between the assignees of the above bankrupt and Mr. William Vorley, as follows: that the building agreement for eighteen houses on land in Junction Road be given up to Mr. Vorley to be cancelled, on payment by him to the assignees of 150*l.* in full for all claims they may have on the property; Mr. Vorley hereby *relinquishing all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above-mentioned houses.* Dated, 23d December, 1854:" That the plaintiff on his own behalf, and the said solicitor of the said assignees on their behalf and by their authority, believing that such written memorandum was in conformity to the said agreement which had been so made as aforesaid, and intending to put the same into writing, and no other, respectively signed and delivered to each other the said written memorandum of agreement so prepared: That the said written memorandum of agreement so signed and delivered was and is the alleged agreement between the plaintiff and the said assignees in the said second plea mentioned, and no other; and that the same was worded as aforesaid *by mistake and error*, so as to include and relinquish the claim of the plaintiff against the said William John Watson and his estate on account of the said 300*l.* paid by the plaintiff in discharge of the said bill as aforesaid, contrary to the true intention *232] *and agreement of the plaintiff and the said assignees when they made the said agreement and when they signed and delivered the said written memorandum as aforesaid: That he, the plaintiff, never relinquished or gave up his said last-mentioned claim against the said William John Watson and his estate, nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the said memorandum of agreement so executed in error as aforesaid: And that the real and true agreement so made between the plaintiff and the said assignees as aforesaid, was in all respects performed and fulfilled by the said parties thereto.

To this replication the defendant demurred, the points stated in the

margin being,—"that the replication, being pleaded on equitable grounds, must be supported (if at all) on equitable grounds only,—that it was therefore immaterial whether the replication amounted to an argumentative denial or other answer at law to the plea,—that the replication did not show any equitable ground of answer to the plea, within the meaning of the Common Law Procedure Act, 1854,—that, instead of answering the matters of the plea, the replication was addressed by anticipation to some supposed evidence by which (as it suggested) the defendant would support the plea,—that the inquiry it raised was altogether foreign to the objects and jurisdiction of a court of law,—that it was an attempt to obtain from a court of law the result to be properly obtained only by a suit in equity to reform the contract,—that, if the plaintiff anticipated that the agreement mentioned in the plea would at the trial be supported by written evidence which he would not be allowed to contradict by oral testimony, his proper course would have been to file a bill in equity,—that the replication sought to raise questions and issues in the cause which were altogether collateral and foreign to it, and involved matters beyond its scope,—that the replication *did not show circumstances under which even a court of equity would interfere,— [*233 and that the replication did not deny the performance of the agreement relied on in the plea, in the sense and according to the meaning therein alleged, nor show that it was performed by mistake."

Phipson, in support of the demurrer.—The question is, whether the replication is a good answer on equitable grounds to the legal defence set up by the plea. The defence is, that the plaintiff has chosen, without the defendant's consent, to settle this claim with the assignees of Watson: in substance, it amounts to a payment by the principal to one of the sureties. The replication can only be treated as an *equitable* replication. [WILLES, J.—I do not assent to that. Although pleaded as a replication upon equitable grounds, if it contains a legal answer, it is good at common law.] Teede *v.* Johnson, 11 Exch. 840,† 25 Law Journ. Exch. 110, is very like the present case. To a declaration on a guarantee by the defendant for payment of goods supplied by the plaintiff to one Jessop, the defendant pleaded, that after Jessop became indebted to the plaintiffs, Jessop being also indebted to other persons, by an indenture between Jessop of the first part, Edwards and Bishop (one of the plaintiffs), trustees for themselves and the rest of the creditors, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of Jessop, of the third part,—after reciting that Jessop was indebted to the parties thereto of the second and third parts in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full,—it was witnessed that Jessop assigned all his estate and effects to the said trustees, upon trust to pay, rateably *and without preference, to themselves and their partners, and the parties [*234

thereto of the third part, the sums set opposite their names in the schedule; and in consideration of the assignment, the several creditors parties thereto of the second and third parts released Jessop from all debts which they or their partners might have against Jessop up to the date thereof. To this plea there was a replication, on equitable grounds,—that Bishop executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign or seal the schedule; nor was the debt of the plaintiffs contained therein; and that, if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect. The Court of Exchequer held, on demurrer to the replication,—first, that, the release being general in its terms, the execution of the deed by Bishop operated as an extinguishment of the debt due to the plaintiffs,—secondly, that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds. Bramwell, B., in the course of the argument,(*a*) intimated that the plaintiffs must make out the replication to be good on equitable, not legal, grounds. [WILLES, J.—If the plea sets up a defence on equitable grounds, the replication must be equitable too. But, where the plea sets up a defence at law, the replication may be supported whether on legal or equitable grounds.] Here, the replication clearly is not good on legal grounds: it states a verbal agreement between the parties; and then it sets out the actual agreement which they signed. [WILLES, J.—*235] Does the written agreement preclude the plaintiff from suing *on the bill? Has he discharged the principal?] Bankruptcy is an answer to that. The whole claim was evidently intended to be covered by the written agreement. Then, the replication is not good on equitable grounds. It is now clearly settled that a pleading, to be good on equitable grounds, must be such as to show what would in a court of equity be a complete answer to the claim or defence, and would, as such, afford ground for a perpetual injunction granted absolutely and without any conditions: Mines Royal Societies *v.* Magnay, 10 Exch. 489, 493;† Teede *v.* Johnson, 11 Exch. 840;† Wodehouse *v.* Farebrother, 5 Ellis & B. 277 (E. C. L. R. vol. 85); Wood *v.* The Copperminers' Company, 17 C. B. 561 (E. C. L. R. vol. 84). There is no case to be found in equity, where there has been an injunction restraining the setting up of an agreement on the ground of mistake, where the party sought to be enjoined has not been affected with knowledge. Equity will not reform an agreement, except where there is mutual error or mistake; and then only in a suit between the same parties: Story's Equity Jurisprudence, §§ 133, 140, 141, 155; Steele *v.* Haddock, 10 Exch. 643, 24 Law Journ. Exch. 78. Here, there is no mistake as between the plaintiff and the defendant. The plaintiff has entered into an agreement

(*a*) See 25 Law Journ. Exch. 111.

which is a bar to his claim. It is not suggested that the defendant knew of the parol contract, or that there had been any mistake or error; nor is it suggested that there has been any want of good faith.

J. Brown, contrà.—The demurrer admits that there is a mistake in the agreement; and the argument concedes that the defendant, being a party to the agreement, cannot be allowed to take advantage of the mistake. It is also admitted by the pleadings that the agreement has been fully executed according to the real intention of the *parties. But it is said that the plaintiff is bound first to go into equity [*236 to reform the agreement. What is the reason why a surety is allowed to set up the discharge of his principal? Because it would be inequitable to allow the creditor under such circumstances to recover against the surety, inasmuch as that would be an indirect way of violating his own engagement. That reason, however, fails here; because it is admitted that there is no equity as between the defendant and Watson. What, then, becomes of the distinction suggested by the other side? The parties who made the mistake are unwilling to take advantage of it; and yet it is insisted that a third person, who is not prejudiced by it, may. It is said that the replication is bad; for, that the case it sets up is not one in which a court of equity would grant unconditional relief. But, what condition could a court of equity impose here? None has been suggested. It would be idle to ask a court of equity to reform the agreement, in the face of the admission on the pleadings that it has been fully performed: per Parke, B., in Steele *v.* Haddock. In Wood *v.* Dwarris, 11 Exch. 493,† to a declaration on a policy of assurance, the defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition, that, if any statement in the proposal was untrue, the policy should be void; and that a particular statement was untrue. To this there was a replication, on equitable grounds, that, before the policy was made, the defendants issued a prospectus containing a statement that all policies effected by them should be indisputable except in cases of fraud; and that the plaintiff effected the policy on the faith of such representation. The defendants rejoined, that the policy was made on the basis of the proposal, and that there was not, before or at the time of the making of the policy, any promise *by the defendants that the policy should be indisputable except in cases of fraud, except that, before the [*237 proposal, the defendants issued the prospectus containing such statement. It was held that the rejoinder was bad, and that the replication was, on equitable grounds, a good avoidance of the plea. "It is true," says Pollock, C. B., "that, if a plaintiff seeks to enforce in a court of equity the specific performance of an instrument primâ facie good at law, the defendant cannot set up as a defence that the instrument does not disclose the real contract, which is open to some objection either on the ground of fraud, or usury, or simony, &c., but the defendant must file a cross-

bill to have the instrument reformed. The reason is, that a court of equity acts upon certain rules peculiar to such a court; but no such rules prevail in a court of law. There are cases in which a court of equity, in reforming an agreement, would require the parties to be placed in statu quo, which a court of law would not do. Therefore I am disposed to hold, that, under the 83d section of the Common Law Procedure Act, 1854, this replication affords a good equitable defence. It certainly discloses matter which renders it inequitable that the plea should prevail; and I think that we ought to give effect to it, and decide in favour of the party who has the equitable right." That approaches very nearly to the present case. The distinction is well pointed out in Perez v. Oleaga, 11 Exch. 506.† There, to an action for the non-performance of an alleged agreement to load a ship for a particular voyage with a guarantied freight of not less than 5500*l.*, the court refused to allow the defendant to plead, by way of equitable defence, that the real contract was, that the ship should earn freight at such a rate per ton, that, if filled, she would obtain 5500*l.*; and that, by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly *understood, it was described as an absolute guarantee that the ship should have a freight of 5500*l.* Alderson, B., said: "It is doubtful whether the subject-matter of the proposed plea would not be a good defence under a plea denying the contract. It may be so: but, even if it would not, we are of opinion that we ought not to allow the plea for the purpose of determining in this court a question which can only be properly determined in a court of equity. If the defendants have equitable ground for reforming the contract, they should apply to a court of equity, where they would be answered by the statement of the plaintiffs, and the question would be raised upon hearing the evidence on both sides, and the court might perhaps direct an issue. How can that question be raised by plea in a court of law? This is not the case of an *executed* contract, as in Steele v. Haddock, but the plea is set up as an equitable defence to an *executory* contract, and therefore the question whether it is to be performed depends upon our determining an equitable issue, which we have no power to do." There are many cases in equity where a party is allowed to defend himself on the ground of mistake, without reforming the agreement: see Sugden's Vendors, 10th edit., §§ 18—24. The written agreement, in truth, does not relinquish this remedy against the defendant. The agreement entered into with the assignees was confined to the building contract: the 300*l.* in question has nothing to do with it. The evident intention was, that Mr. Vorley should relinquish by the written agreement all money advanced to the bankrupt "for the above-mentioned purposes." The introduction of the subsequent words "his claim" really makes no difference. And, if there be any ambiguity, it is latent, and may be explained by parol.

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Phipson was heard in reply.

*CRESSWELL, J.—I am of opinion that our judgment in this case must be for the plaintiff. I certainly thought at one time, [*239 and still incline to think, there is doubt about the sufficiency of the agreement to protect the defendant. But I think the equitable matter replied is sufficient to get rid of it. It is admitted, that if the agreement does include the bill in question, it was a mistake, and that the plaintiff should in some way have the means of rectifying it; and the only question is, whether that is to be done here or elsewhere. I apprehend that it was the intention of the legislature, in making these provisions, to give the parties the benefit of an equitable answer or defence, without incurring the expense or inconvenience of going into a court of equity. If, therefore, the case is one in which a court of equity would relieve against the strict letter of the agreement, it is one in which we ought to give the judgment here for the plaintiff. The agreement has been fully performed, and therefore it would be too late to apply to a court of equity to reform it. Besides, the defendant is no party to the agreement. If, therefore, he went to a court of equity, he must drag Watson or his assignees there. I think the cases cited show, that, where it is sought to enforce an agreement in equity, it is competent to the party against whom performance is sought to be enforced, to show by oral testimony that there is mistake. So, here, I think the plaintiff ought to be allowed to answer the equitable defence attempted to be set up, by showing that the agreement was never intended to include this bill.

WILLIAMS, J.—I also am of opinion that the plaintiff is entitled to judgment. We should be entirely defeating the intention of the legislature in allowing equitable pleas and replications, if we were to hold this replication bad.

*CROWDER, J.—I am of the same opinion. I think, that, unless we give judgment for the plaintiff in this case, we shall [*240 seriously impair the operation of the equitable pleading clauses of the Common Law Procedure Act, 1854. Nothing could be more unjust and inequitable than to allow such a defence as that attempted to be set up here. It is said, that if the plaintiff wants to avail himself of the fact that the written agreement does not truly represent the contract between the parties, he should go to a court of equity to get it reformed. The very object of the Common Law Procedure Act in these clauses was, to enable courts of law to administer equitable relief, without driving the parties to the useless and vexatious expense of proceedings in a court of equity. Mr. *Phipson* does not pretend that the agreement can ultimately be set up as an answer to the action; but only, that, to enable him to make his defence, not only the parties to the agreement themselves, but also the assignees of Watson, must be dragged into a court of equity. It seems pretty clear that the necessity for reforming an

agreement in equity exists only in the case of agreements that are executory, and not where they are fully performed and executed.

WILLES, J., had gone to Chambers.

Judgment for the plaintiff.

*241] *KERSALL v. MARSHALL. *Nov.* 14.

By an act of the council of India, to enable the Union Bank of Calcutta to sue and be sued in the name of their secretary or treasurer, it was, amongst other things, enacted, that all actions, &c., against the company should be brought against the secretary or treasurer for the time being as the nominal defendant; that a memorial of the names, &c., of the directors, secretary, and treasurer, and of the several persons members and proprietors of the bank, should be enrolled in the manner therein mentioned; and that every judgment, &c., in any action, suit, or proceeding in India, against the secretary or treasurer, should (subject to the express provisions of the act) "have the like effect and operation upon and against the property and funds of the bank, as if such judgment, &c., had been made or pronounced against all its members, and as if all the members had been parties before the court to such action, suit, and proceeding, and as if the act had not passed."

The act then provided, that, in case execution upon any judgment in such action, &c., obtained against the secretary or treasurer, should be ineffectual for obtaining satisfaction against the funds of the bank, execution might issue,—first, against proprietors for the time being,—and, that proving ineffectual, then against persons who were proprietors at the time of the contract: Provided that no such execution should issue against any other person than the actual party to the suit, without leave of the court in which the action was brought:—

Held, that there was nothing in the act to prevent a creditor having obtained a judgment against the secretary of the bank in India, from enforcing it by action against a shareholder in this country,—the special provisions as to execution merely regulating the mode of procedure in India; and that the non-enrolment of a memorial in pursuance of the act, was no answer to an action upon such judgment.

THE first count of the declaration stated, that, before and at the several times in that count mentioned, divers persons had formed themselves into a company established at Calcutta, in the presidency of Bengal, in the East Indies, under the name, style, and firm of The Union Bank of Calcutta, for the purpose of carrying on at Calcutta aforesaid the trade and business of bankers; and the said company were before and at the times aforesaid carrying on at Calcutta aforesaid the said trade and business of bankers: That, after the said formation and establishment of the said company, and whilst the same was carrying on the said trade and business of bankers as aforesaid, to wit, on the 2d of November, 1845, a certain act was made and passed by the president of the council of India in council, with the assent of the governor-general of India, relating to and concerning the said last-mentioned company, to wit, an act intituled "An Act to enable the Union Bank of Calcutta to sue and be sued in the name of the secretary
*242] or of the treasurer of the *said company," and numbered and called Act 23, of 1845: in which said act were and are, amongst others, the enactments following, that is to say, "Whereas, by and under a certain deed of partnership or association, or an agreement in writing of that nature, bearing date the 1st of August, 1839, several

persons have formed themselves into a certain company or copartnership by the name of 'The Union Bank of Calcutta,' by which said deed or agreement it was and is provided (amongst other things) that the business of the said company should consist in issuing promissory notes payable to bearer on demand at their office in Calcutta, for any sum of not less than 8 company's rupees, and not exceeding 1000 company's rupees, and bills of exchange payable at such time after date or sight as the directors for the time being should fix, to parties who should require the same and deposit the amount of such bills in the said bank, which deposit should bear interest at such rate as the directors should fix; and also in discounting bills and promissory notes not having a longer period to run than four months from the time of discounting the same respectively; and also in lending money on the security of personal property, for any period not exceeding four months, or in cash accounts to persons depositing undoubted security, such accounts to be settled at the end of every three months; and in all other branches of business usually transacted by bankers in Calcutta; and by which said deed or agreement it was and is further provided that the capital stock and fund of the said company should amount to the sum of 1,000,000 of company's rupees, with certain provisoes for increasing the same when and if it should be deemed expedient: And whereas difficulties have arisen and may hereafter arise in recovering debts and moneys due to the said company called The Union Bank of Calcutta, and in maintaining actions for damages done the said company to the property of the said Union *Bank, since [*243 by law all the members for the time being of the said company must be named in every action or suit carried on for such purpose: And whereas it would be convenient that persons having demands against the said company should be entitled to sue one of the two officers hereinbefore mentioned or described in that behalf,—therefore, for obviating and removing the difficulties aforesaid, it is hereby enacted, that, from and after the passing of this act, all actions, suits, and other proceedings whatsoever at law or in equity for any injury or wrong done to any real or personal property of the said Union Bank, in whomsoever the same may for the time being be vested, whether in the said company or in some person or persons in trust for the said company, or upon or in respect of any present liability or liabilities to the said Union Bank or to any person or persons in trust for the said Union Bank, or upon any bonds, covenants, contracts, or agreements which already have been or hereafter shall be given or entered into with the said company, or to or with any person or persons whomsoever in trust for the said Union Bank, or wherein the said Union Bank is or shall be interested, and also all instruments and petitions to found any adjudication of insolvency in any court for the relief of insolvent debtors, against any person or persons indebted to the said Union Bank, and liable to have been made

insolvent by the law now or at any time hereafter in force relating to insolvents in the East Indies, and generally all other proceedings whatsoever, at law or in equity, to be commenced, instituted, or carried on by or on behalf of the said Union Bank, or wherein the said Union Bank is or should be concerned or interested, against any person or persons, body or bodies politic or corporate or others, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members, proprietor or proprietors, of or in the said Union Bank, or not, *shall and lawfully may be commenced, instituted, presented, and prosecuted or carried on *in the name of the* person who shall be the *secretary, or of the* person who shall be the *treasurer of the said Union Bank* at the time such action, suit, or proceeding shall be commenced or instituted, as the nominal plaintiff or petitioner for or on behalf of the said Union Bank; and all actions, suits, and proceedings at law or in equity, as well for subsisting as future accruing claims, debts, or demands, to be commenced or instituted against the said Union Bank by any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members, proprietor or proprietors, of or in the said Union Bank or not, shall be commenced, instituted, or prosecuted *against the said secretary* for the time being of the said Union Bank, *or the said treasurer* for the time being of the said Union Bank, as the nominal defendant, respondent, or defender for and on behalf of the said Union Bank; and the death, removal, resignation, or any other act of such secretary or treasurer, or the bankruptcy or insolvency of such secretary or treasurer, shall not abate or prejudice any action, suit, or other proceeding at law or in equity commenced under this act, but the same may be continued, prosecuted, and carried on or defended in the name of any other the secretary or treasurer for the time being of the said company: And it is hereby further enacted, that the directors of the said Union Bank shall cause a memorial, in the form and to the effect expressed in the schedule to this act, or as near thereto as the circumstances of the case will admit, of the names, residences, and description of the directors, secretary, and treasurer, and of the several persons being members and proprietors of the said Union Bank, to be verified by a declaration in writing to be made before the master in equity *244] *of Her Majesty's supreme court of judicature at Fort William, in Bengal, by the secretary or some one of the said directors for the time being; and the same shall be enrolled amongst the records of the said supreme court within twelve calendar months next after the passing of this act; and, whenever any new director or directors or secretary or treasurer shall be elected, a like memorial shall be verified and enrolled as aforesaid, specifying in whose place or places he or they shall be appointed, within twelve calendar months after such appointment: And, whenever any person or persons shall cease or discontinue

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to be a proprietor or proprietors of the said Union Bank, a memorial of his, her, or their names shall be in like manner verified within twelve calendar months after such person or persons shall have so ceased or discontinued to be such proprietor or proprietors, in the form expressed in the said schedule for that purpose; and, when any new proprietor or proprietors shall be admitted into the said Union Bank, a memorial of his, her, or their names shall be in like manner verified and enrolled among the records of the said supreme court of judicature within twelve calendar months afterwards, according to the form in the said schedule: Provided always, that, if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be guilty of a misdemeanor: And it is hereby further enacted, that, until such memorial as first hereinbefore mentioned shall have been deposited and enrolled as hereinbefore directed, no action or suit shall be brought by the said Union Bank under the authority of this act; and, until the memorial by this act required to be deposited and enrolled, in the event of any person or persons ceasing or discontinuing to be a director, or secretary, or treasurer, or member of the said Union Bank, shall have been deposited and enrolled as hereinbefore mentioned, the *person or persons whose names shall appear in the said memorial which shall have been made and enrolled, shall [*246 be, and are hereby declared to be, liable to all such actions, suits, and executions upon judgment or decree, and other proceedings under this act, in the same manner as if he, she, or they had not ceased or discontinued to be a director, secretary, or treasurer, or proprietor of the said Union Bank: And it is hereby further enacted, that an examined copy of every memorial to be deposited and enrolled pursuant to this act, certified to be a true copy by and under the hand and signature of the keeper of the records and muniments for the time being of the said supreme court of judicature, shall be received in evidence as proof of the contents of such memorial, and proof shall not be required that the person by whom the memorial purports to be verified was at the time of the verification one of the directors of the said Union Bank: And it is hereby further enacted, that all and *every judgment* and judgments, decree and decrees, order and orders, made or pronounced in any action, suit, or proceedings in any court of law or equity within the limits of the territories of the East India Company, *against the secretary or treasurer* for the time being of the said Union Bank, *shall* (subject to the express provisions of this act) *have the like effect and operation upon and against the property and funds of the said Union Bank, as if such judgment, decree, or order had been made or pronounced against all the members of the said Union Bank, and as if all the members of the said Union Bank had been parties before the court to such action*, suit, or proceedings, and as if this act had not passed: Provided always, and it is hereby further enacted, that, in case execution upon any judg-

ment or decree in any such action or suit obtained against the secretary or treasurer of the said Union Bank as defendant or respondent or otherwise, shall have been issued and taken out against the
*247] *funds and property of the said Union Bank under the provisions of this act, and shall be ineffectual for obtaining full payment and satisfaction for the sum or sums sought to be recovered, then and in such case execution upon any such judgment or decree shall be issued against any other individual proprietor or proprietors of the said Union Bank successively as it may become necessary, to enforce payment and satisfaction of the said judgment or judgments: Provided also that every such secretary or treasurer in whose name any such action or suit shall be commenced, prosecuted, or defended, and every director or member against whom execution upon any judgment or decree obtained in any such action or suit shall be issued as aforesaid, or as hereinafter mentioned, shall always be reimbursed and paid out of the funds or property of the said Union Bank all such loss, damages, costs, and charges as by the event of any such proceedings he or they shall be put unto or become chargeable with; and, *if the funds or property of the said Union Bank shall be insufficient to pay the said loss, damages, costs, or charges, then the deficiency shall be made good by the proprietors for the time being of the said Union Bank:* Provided also, that, if any such execution against the secretary or treasurer or member or members for the time being of the said Union Bank shall be ineffectual for obtaining payment of the sum or sums sought to be recovered thereby, it shall be lawful for the party or parties so having obtained judgment or decree against the secretary or treasurer for the time being of the said Union Bank, to issue execution against any other person or persons who was or were a member or members thereof at the time the contract or contracts was or were entered into upon which such action or suit was or were instituted; *but no such execution shall be issued against any other person than the actual party to the action or suit, without leave first granted in open court* by the
*248] *court in which such action or suit may have been brought or instituted, and which shall be made on notice to the person or persons sought to be charged: *Provided also, that nothing herein contained shall render such past members or proprietors liable for payment of any debt or claim for which such action, suit, or proceeding may have been brought, to which they would not have been liable by operation of law, as partners, in case any action or other proceeding had been originally brought against them for the same:* And whereas it is expedient that every member of the said Union Bank against whom any execution shall be issued upon any judgment or decree (under the authority of this act) shall have an easy and expeditious mode of recovering all such losses, damages, costs, and charges as he or she shall be put to or become chargeable with in consequence thereof, it is

therefore hereby enacted, that, if any execution upon any judgment or decree obtained in any action, suit, or proceeding under this act shall be issued against any other proprietor or member of the said Union Bank, and such proprietor or member shall not within the space of one month next after the issuing thereof be reimbursed out of the funds or property of the said Union Bank, all such moneys, costs, charges, losses, and expenses as he or she shall have paid or been put to or become chargeable with in consequence of such execution having been issued against him or her, it shall be lawful for such member or proprietor to divide such moneys or costs or charges, or so much thereof as he or she shall not have been reimbursed as aforesaid, into as many equal parts or shares as the capital of the said Union Bank shall at the time be divided into, and each and every proprietor for the time being of any share or shares in the said company shall, in proportion to the number of shares he or she may hold in the said Union Bank, pay one or more of such parts or shares upon demand to the member or *proprietor against whom such execution shall have issued, or to his or her executors or administrators, and, upon the neglect or [*249 refusal of any proprietor of the said company to pay, upon demand, his or her due and fair proportion of such moneys, costs, and charges, then and in such case it shall be lawful for the proprietor, or such person to whom the same ought to have been paid, to sue for and recover the same in and by an action, suit, or plaint against the proprietor, or the executors or administrators of any proprietor who shall so neglect or refuse as aforesaid, in Her Majesty's supreme court of judicature in Calcutta: And it is hereby further enacted, that this act, and the provisions herein contained, shall extend and be construed to extend to the said company called the Union Bank at all times during the continuance thereof, whether the said Union Bank hath been or be now or shall hereafter be composed of all or of some of the persons who were the original members thereof, or of all or some of those persons together with some other person or persons, or whether the said Union Bank be at the time of passing this act composed altogether of persons who were not original members of the said Union Bank, or whether the said Union Bank shall hereafter be composed of persons who were not original members thereof, or of persons all of whom shall become members subsequently to the passing of this act." The declaration then proceeded to aver, that, afterwards, and before and at the time of the bringing of the action and the recovery of the judgment hereinafter mentioned, the said act became and was, and from thence continually hitherto had been, and still was, the law of and in Calcutta aforesaid, and of and in the said presidency of Bengal, applicable to the said company: That, after the said act had become, and whilst the same was such law as aforesaid, and within twelve calendar months next after the passing of the said act, such a memorial as is in the

*250] said act and hereinbefore first mentioned, was duly *verified and enrolled as directed by the said act; and that afterwards, and before and at the times of the bringing of such action and of the recovery of such judgment as thereinafter mentioned, one John Leslie Russell, who during all the time last aforesaid was resident within the said presidency, and subject to the jurisdiction of Her Majesty's supreme court of judicature at Fort William, in Bengal aforesaid, and to the law of Calcutta, and of the presidency aforesaid, was the secretary of the said company; and the defendant, before and at the respective times last aforesaid, and also before and at the times of the making of the promises by the said company as thereinafter in that count mentioned, was, and from thence respectively hitherto had been, and still was, a member of the said company: and that thereupon, to wit, on the 25th of February, 1848, the plaintiff and William Strettell Kelsall and James Knight Heron (both since deceased) filed their plaint in an action of trespass on the case upon promises, on the common law side of the said supreme court at Fort William, in Bengal aforesaid, and then caused the said John Leslie Russell, as such secretary of the said company, to be summoned, according to the course and practice of the said supreme court, to appear as the nominal defendant for and on behalf of the said company, in the said court, pursuant to the provisions of the said act, to answer the said now plaintiff and the said William Strettell Kelsall and James Knight Heron, since deceased, in the said action: That the said John Leslie Russell duly appeared in the said court, according to the course and practice thereof, to such summons; and that such proceedings were thereupon had therein and in the said action, that, afterwards, to wit, on the 14th of March, 1848, the now plaintiff, and the said William Strettell Kelsall and James Knight Heron (since deceased), by the consideration and judgment of

*251] the said supreme court, recovered *against the said John Leslie Russell, as such secretary as aforesaid, as well a certain sum of company's rupees 160,095, and 10 annas, for the damages which the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) had sustained by and on account of the non-performance of certain promises before that time made by the said company to the said now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased), as also the sum of company's rupees 623, 4 annas, and 7 pice, for their costs and charges by the said last-mentioned court there adjudged to the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) with their assent; which said damages, costs, and charges in the whole amounted to company's rupees 160,718, 4 annas, and 7 pice,—whereof the said John Leslie Russell, as the secretary of the said last-mentioned company as aforesaid, and as such defendant as aforesaid, was convicted: That the said promises were made, and the said causes of

action of the said now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) in respect thereof arose, within the jurisdiction of the said supreme court; and that the said last-mentioned court, during all the time whilst the said action was depending therein as aforesaid, and continually and at the time of the giving of the said judgment, was duly holden within the jurisdiction thereof, to wit, at Fort William, in Bengal aforesaid: And that the said judgment still remained in full force and effect, and not in anywise satisfied, reversed, or annulled; *and that no execution had as yet been obtained of or upon the said judgment;* and that the damages, costs, and charges aforesaid in form aforesaid adjudged to the now plaintiff and the said William Strettell Kelsall and James Knight Heron (since deceased) were of great value, to wit, of the value of 16,071*l.* 17*s.* 9½*d.* of lawful money of the United *Kingdom and were still due to the plaintiff: Yet that the defendant had not paid the said last-mentioned sum of money, or any part thereof, but the same was wholly unpaid. [*252

The declaration also contained seventeen counts charging the defendant as the drawer of seventeen several bills for sums amounting in the aggregate to 14,500*l.*, dated respectively the 24th of September, 1847, at Calcutta, and drawn upon Messrs. Glyn, Halifax, Mills & Co., bankers, London, payable respectively six months after sight to the order of one William Henry Abbott, which bills were duly presented and refused acceptance, of which the defendant had notice: and also counts for money lent by the plaintiff and W. S. Kelsall and J. K. Heron to the defendant; for money had and received by the defendant for their use; for interest; and for money found due from the defendant to them upon accounts stated.

The defendant demurred to the first connt. He also pleaded to the first count, that no such memorial as in the said act and in the said first count first mentioned, was verified or enrolled in the manner required by the said act, as alleged.

Twelfth plea to the second and subsequent counts,—that, before and at the time of the accruing of the alleged several causes of action in the said several counts mentioned, a company was established at Calcutta, in the presidency of Bengal, in the East Indies, under the name and firm of The Union Bank of Calcutta; and that the liability of the said company, and of the several members thereof, in respect of all causes of action against the said company for all claims, debts, and demands, and in respect of all obligations and engagements contracted or incurred by the said company, was, before and at the time of the accruing of the several alleged causes of action in the said counts stated, and from thence hitherto *had been, regulated and governed by a certain act made and passed by the president of the council of India in council, with the assent of the governor-general of India, to [*253

wit, the said act in the first count of the declaration mentioned; in which said act are contained the several clauses and provisions in the said first count set forth, and which for the sake of brevity are here referred to: That afterwards, and before and at the time of the bringing of the action and the recovery of the judgment thereinafter mentioned, the said act became, and from thence continually had been, and then was, the law of and in Calcutta and the said presidency of Bengal applicable to the said company; and that, after the said act had become and while it was law as aforesaid, and within twelve calendar months next after the passing of the same, such a memorial as in the said act and in the first count of the declaration first mentioned, was duly verified, deposited, and enrolled as directed by the said act; and that afterwards, and before and at the time of the bringing of such action and of the recovery of such judgment as thereinafter mentioned, one John Leslie Russell, who during all that time was resident within the said presidency, and subject to the jurisdiction of Her Majesty's supreme court of judicature at Fort William, in Bengal aforesaid, and to the law of Calcutta and of the presidency aforesaid, was the secretary of the said company: That, on the 25th of February, 1848, the plaintiff and William Strettell Kelsall and James Knight Heron (both since deceased) filed their plaint on the common law side of the said supreme court at Fort William, in Bengal, as in the said first count mentioned; and that such proceedings were then and thereon had as in the said first count mentioned; and afterwards, on the 14th of March, 1848, the plaintiff and the said William Strettell Kelsall and James Knight Heron, since deceased as aforesaid, by the consideration and judgment of the said court recovered *against the said John Leslie Russell, as such secretary as aforesaid, such sums as in the first count of the declaration in that behalf mentioned: That the causes of action in respect of which such judgment was recovered arose within the jurisdiction of the said court; and that the same were and are the same identical causes of action as those in the said several counts contained; and that they arose against the defendant only in respect of claims and demands against the said company, and by reason of obligations and liabilities incurred by the said company, and not otherwise: That the defendant was sued in this action as a member of the said company, and not otherwise: And that the said judgment was a good, valid, and effectual judgment.

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The plaintiff joined in demurrer to the first count, and demurred to the first and twelfth pleas. Joinder.

Phipson (with whom was *Montague Smith*), for the plaintiff.(a)—1.

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That the defendant, having been a partner in the Calcutta Bank at the time when the causes of action accrued upon which the judgment was obtained in India, and from that time to the present, is liable in this country upon an implied promise to pay the sum for which such judgment was recovered, in the same manner in which he would have been liable had it been obtained against himself individually:

"2. That the first plea is bad, on the ground that the act does not disable the creditor from

This is substantially an action against *a person who was a party [*255
to the judgment in the supreme court of Calcutta. The defendant and his partners have agreed that the secretary or treasurer shall be sued, and that a judgment obtained in an action against either of those persons as the nominal plaintiff, shall have the same effect and operation upon and against the property and funds of the bank, as if such judgment had been pronounced against all the members, and as if all the members had been parties to the action. The distinction between this case and The Bank of Australasia *v.* Harding, 9 C. B. 661 (E. C. L. R. vol. 67), and The Bank of Australasia *v.* Nias, 16 Q. B. 717 (E. C. L. R. vol. 71), is, that, here, judgment must have been obtained against the bank, and that judgment prove ineffectual; whereas, in the act there in question, there was no such provision. [CRESSWELL, J.—Nor was there any provision that the judgment should have the same effect as if all the members of the bank had been parties to the action.] The act of council in India can have no operation to control the laws of any other country. If the question were now for the first time presented to the court, they could have no difficulty in dealing with it upon principle. The judgment imposes upon the defendant a moral obligation to pay the debt, which moral obligation is a good foundation for an action against him here: Walker *v.* Witter, 1 Dougl. 1; Russell *v.* Smyth, 9 M. & W. 810, 818.† In the last-mentioned case, Lord Abinger says: "The action(*a*) may be sustained on the ground of morality and justice. The maxim of the English law is, to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of *substantial [*256
justice. Foreign judgments are enforced in these courts, because the parties liable are bound in duty to satisfy them." And Parke, B., says: "Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." The provisions in the Indian act for facilitating the enforcing of the judgment, are modes of procedure only, and do not in any way interfere with the question of contract, or with the plaintiff's right to sue upon the judgment in this country. The construction of a contract is governed by the law of the place where it is entered into; the mode of enforcing it, by that of the place where it is sought to be enforced. "The distinction," says Tindal, C. J., in Huber *v.* Steiner, 2 Scott, 304, 326, 2 N. C. 202, 210 (E. C. L. R. vol. 29), "between that part of the law of the foreign country where a personal contract is made,

suing the bank in the name of the secretary before the filing of a memorial under the act; but that the act only prevents the bank from bringing an action in the name of the secretary until such memorial has been filed; and, further, that the matter of the first plea should have been pleaded to the original action, and was no bar to the present claim:

"3. That the twelfth plea was bad, on the ground that the provisions of the act do not prevent the plaintiff from suing the defendant personally in England in respect of causes of action against the company of which he was a member."

(*a*) Against a defendant resident in this country, for costs awarded against him, after appearance, by a decreet of the court of session in Scotland, in a suit for a divorce.

which *is* adopted, and that which is *not* adopted by our English courts of law, is well known and established, viz. that so much of the law as affects the *rights* and *merit* of the contract, all that relates 'ad litis decisionem,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates 'ad litis ordinationem,' is taken from the 'lex fori' of that country where the action is brought."(a) The cases of Needham v. Law, 11 M. & W. 400,† and Webb v. Taylor, 1 D. & L. 676, show that the shareholders are the real defendants in these actions: the bringing the suit in the name of the secretary or treasurer is mere matter of form. And there is more reason that it should be so, where the action is against a foreign corporation. Lord Campbell, in giving judgment in The Bank of Australasia v. Nias, 16 Q. B. 733 (E. C. L. R. vol. 71), says: "The colonial legislature, we think, clearly had *257] authority to pass an act *regulating the procedure by which the contracts of the banks should be enforced in the courts of the colony. Nor is there anything at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process, and, being a party to the record, the recovery had been personally against him. The act imposes no new liability upon him, but only regulates the mode in which that liability shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony cannot be obtained out of the colony; and, unless the judgment may be made the foundation of an action, it could not in any manner be rendered available in this country. In recompense for the advantages conferred upon the company by the act, it anxiously provides that the rights of the creditors of the company shall not be prejudiced by it." The same principles governed the decision in this court. Wilde, C. J., says: The statute provides "that one member, holding a principal office in the company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial act, the defendant would have been liable in respect of the demand for which he is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment." *258] The act *makes it imperative to sue the secretary or treasurer in India: Steward v. Greaves, 10 M. & W. 711.†

(a) And see Trimbey v. Vignier, 4 M. & Scott, 695 (E. C. L. R. vol. 30), 1 N. C. 151 (E. C. L. R., vol. 27)

2. Then, is the plaintiff's right of suing upon the judgment at all affected by the provisions in the colonial act for enforcing it by execution against the shareholders? Those enactments, it is submitted, provide merely for the mode of regulating the procedure on the judgment in the colony, and cannot in any way interfere with or alter the legal effect and operation of the judgment in a foreign country. [CRESSWELL, J.—Are you not compelled to resort to the act to maintain the action?] We could not maintain an action against a stranger in India without the act. [CRESSWELL, J.—Then it will probably be urged, on the other side, that you must take the whole act, including the mode of procedure to enforce the judgment. Could you sue upon the judgment in Calcutta?] No. But the implied assumpsit raised by the judgment is not affected by any local stipulations for the mode of enforcing it there. In Hall *v.* Odbee, 11 East, 118, a foreign judgment recovered by the plaintiff, with a stay of execution for six months, was held to be good evidence in support of an account stated. Lord Ellenborough said: "The judgment is for a sum certain found to be due from the defendant to the plaintiff, with interest thereon from a certain day past; but with a stay of execution till the further order of the court: and this at first struck me as an incomplete judgment, on which no action could be maintained here. But we have been pressed with the course of proceedings in our own courts, where upon judgment recovered and a stay of execution upon the allowance of a writ of error, an action lies nevertheless upon such judgment in the meantime; and applications are continually made to the equitable jurisdiction of the court, to stay proceedings in such actions pending the writ of error." The distinction, therefore, is one of mere procedure. The judgment in the colonial *court is not the less a judgment, because of the local regulations as to enforcing it by execution there. [*259

3. Then, as to the twelfth plea,—if it means that the simple contract debt is merged in the judgment, the cases of The Bank of Australasia *v.* Nias, and The Bank of Australasia *v.* Harding, are conclusive to show that it is not. [*Byles*, Serjt., intimated that he did not intend to insist that it was.] The act of the Indian legislature can have no operation out of the Indian territory. [CRESSWELL, J.—It will probably be contended that the defendant never consented to be placed in jeopardy by the recovery of a judgment against the secretary or treasurer, except under certain circumstances, and in a particular manner.] That argument goes to the very root of the decision in the two cases referred to, and is distinctly met by the judgment.

Byles, Serjt. (with whom was *John Gray*), for the defendant.(*a*)—

(*a*) The points marked for argument on the part of the defendant, were,—

"1. That the first count is bad, and discloses no cause of action, or right to proceed against the defendant in the English courts:

"2. That the judgment is a judgment against the secretary, and not against each individual member; and that, if it were, execution could at once and of course be taken out *against a share-*

*260] There is a material difference between the *cases of The Bank of Australasia *v.* Nias and The Bank of Australasia *v.* Harding and the present case. In those cases, nothing was left to be done except the payment of the money: whereas, here, two steps are to be taken before the now defendant could have execution issued against him in the colony,—first, an ineffectual execution against the funds and property of the bank,—secondly, the leave of the court in which the action was brought must be obtained: and for these he has paid a valuable consideration. Under the Australasian Bank act, it was provided "that execution upon any decree or judgment in any such action, suit, &c., obtained against the chairman for the time being of the bank, might be issued against and levied upon the goods and chattels, &c., of any member or members whatsoever of the said bank for the time being, in like manner and not otherwise than as if such decree or judgment had been obtained against such member or members personally." By the act now under consideration, it is enacted that "every judgment made or pronounced in any action, &c., within the limits of the territories of the East India Company, against the secretary or treasurer for the time being of the said Union Bank, shall (*subject to the express provisions of this act*) have the like effect and operation upon and against the property and funds of the said Union Bank, as if such judgment had been made or pronounced against all the members of the said Union Bank, and as if all the members of the said *261] *Union Bank had been parties before the court to such action," &c. [CRESSWELL, J.—I find nothing subsequently limiting the remedy to the funds of the bank: I think that enactment must be read as if the words "subject to the express provisions of this act" had not been there.] It is enough to say that the judgment has *some* effect against the property and funds of the bank. There are, however, subsequent provisions a compliance with which on the part of the judgment-creditor is a condition precedent to his right to have recourse to individual shareholders. Execution is, in the first place, to issue against the assets of the company. That remedy failing, execution is to go against members for the time being; and then, and not till then,

holder in Bengal; whereas, it is clear that execution could only be had against such shareholder under the special clauses of the act in question:

"3. That it was not competent to the plaintiff to adopt part of the act and reject the rest; that there was no judgment in existence against the bank, or any person representing it, except by force of the act (the said John Leslie Russell being otherwise a stranger both to the bank and the cause of action); and that, consequently, the plaintiff could not put in force his judgment, except under the circumstances and in the manner directed by the act:

"4. That the first plea was good, and the verifying and enrolling such memorial was a necessary condition precedent to the said John Leslie Russell being made the nominal defendant for the bank; and that this memorial was the only evidence admissible of the person sued being such secretary:

"5. That the twelfth plea was good, showing that the plaintiff had already recovered a judgment for the same causes of action, under which he would or might have his remedy, in the manner prescribed by the act, against the defendant and the other shareholders in the bank; and that the plaintiff could not have another action against the defendant in respect thereof."

execution against those who were members at the time of the contract. But the judgment-creditor cannot have execution against shareholders of either degree, except on motion made in open court, upon which motion the party sought to be charged may be heard to urge any defence he may have against it. Suppose the case of a man no party to the contract,—are the provisions of this act, which make him liable upon a contract he never entered into, mere matter of procedure? He is to be liable upon a *final* judgment only. The court will look, not at the form, but at the real nature and substance of the judgment. This is not in substance a final judgment, the true test of which is, where nothing remains but to pay: it is a mere interlocutory judgment. No case can be found where an action has been held to lie in the courts of this country upon a foreign judgment, where no action would have lain upon it in the country where it was obtained. It is clear that the present defendant could not have been sued upon this judgment in the supreme court at Calcutta. If he could, what becomes of all the provisions so studiously introduced into the act for his protection? The plaintiff is obliged here to rely upon the Indian act to make the defendant liable. If so, he *cannot take one part, and reject the rest. It may be conceded that the provisions as to execution in form [*262 seem to relate to procedure. But the question is, whether they are not substantially part of the contract between these parties. Story, in his Conflict of Laws, after noticing in a previous section the distinction, often disregarded, between the obligation and the nature of the contract, says in § 267,—"Suppose a contract by the law of one country to involve no personal obligation (as was supposed to be the law of France in a particular case which came in judgment,—Melan *v.* Fitzjames,(*a*) 1 B. & P. 138), but merely to confer a right to proceed in rem; such a contract would be held everywhere to involve no personal obligation whatsoever. Suppose, by the law of a particular country, a mortgage for money borrowed should, in the absence of any express contract to repay, be limited to a mere repayment thereof out of the land, a foreign court would refuse to entertain a suit giving to it a personal obligation. Suppose a contract for the payment of the debt of a third person, in a country where the law subjected such a contract to the tacit condition that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere accessorial and secondary character; and it would not be enforced in a foreign country, except after a compliance with the requisitions of the local law." That doctrine is very applicable here: the provisions as to the liability of the shareholders in the first and the second degree, after exhausting the remedies against the assets of the bank, are in substance incidents and ingredients in the contract. In Steward *v.* Greaves, 10 M. & W. 711, 720,† Parke, B., says: "At

(*a*) Overruled in Imlay *v.* Ellefsen, 2 East. 453.

common law, all the goods of the contracting parties and their persons would be liable to immediate execution: by the statute, the goods of the
*263] *company are liable, and the members for the time being at the period of execution, in the first instance, and afterwards those who were so at the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple-contract debts for six years, to specialties for twenty: in the statutory mode of proceeding, the members who have ceased to be such for three years are exempt from debts of every description. Thus, the liability created by the statute is very different from that which would exist without it; and it cannot be supposed that the legislature meant to leave it to the option of any creditor, whether the members of the company should be subject to one species of liability or the other; still less that a creditor should have the power of depriving them of the statutory protection which is given to each after having ceased for three years to be a partner. The framers of the act had in view the convenience of the public, and thereby provided a more convenient remedy to creditors than at common law; but they had also in view the benefit of the members of the company, by restricting their personal liability." As to the plea,—it cannot be contended that the judgment operates as a merger. But it is submitted that a good defence is presented by that part of the plea which sets out the act of the Indian legislature, and alleges that the plaintiff has availed himself of the act. It amounts to a contract between the parties that these bills should be satisfied in a particular manner.

Phipson, in reply.—The only operation of the act, is, the mode in which a creditor of the bank shall recover in India. It is mere mode of procedure, and not matter of contract at all. The defendant could not have pleaded or set up in India, in answer to a motion for leave to
*264] issue execution, any matter which would have been an *answer to the action itself. It is even doubtful whether the defendant could be heard at all: the words relied on upon his behalf applying only to a case where it is sought to enforce the judgment against one who was a proprietor *at the time of the contract.* Then it is said that this is not a final judgment. But, why not? It is an absolute and conclusive judgment: and it is not the less final because particular remedies for its enforcement in India are provided by the act. Suppose the act had provided that a judgment against the secretary should operate against goods only,—would that have been binding here? No execution by ca. sa. could be issued against the person in New South Wales; yet the court held that an action might be brought upon the judgment here, and so the creditor might get here a remedy not open to him there. The modes of proceeding to obtain the fruits of the judgment, do not affect the nature of the judgment.

CRESSWELL, J.—I was at first disposed to pay the ingenious argument urged on the part of the defendant the compliment of taking time to consider before pronouncing judgment in this case. But, my Brother Crowder entertaining no doubt, it appears to us that we ought to dispose of it at once. We think the case is governed by the two cases in the Court of Queen's Bench and in this court, of The Bank of Australasia *v.* Nias, 16 Q. B. 717 (E. C. L. R. vol. 71), and The Bank of Australasia *v.* Harding, 9 C. B. 661 (E. C. L. B. vol. 67). It has been suggested that there is a distinction between those cases and the present, by reason of the provision in the act of the Indian legislature as to the mode of enforcing against the members of the company a judgment obtained against the secretary, viz. by execution against individual proprietors, issued by leave of the court after an ineffectual attempt to obtain satisfaction against the funds of the company. But it seems to me that those provisions do not in any degree affect the right of the *judgment-creditor to pursue his remedy upon the judgment in the manner provided by the law of this country. [*265 It has been further urged, that, when the shareholders or proprietors agreed to be bound by a judgment against the secretary or treasurer, they must be taken to have assented to be bound by a judgment which was to be enforced only in the manner provided by the act. But the answer to that is, that the parties must have known that the act of the Indian legislature could have no operation in this country. They consent, therefore, to be sued in the name of the secretary or treasurer, and to be bound by a judgment obtained against him, as if they themselves had been parties to the suit,—leaving all the consequences to follow which ordinarily flow from a judgment. It seems to me, therefore, that the case substantially falls within the principle laid down in the two I have mentioned, and that the plaintiff is entitled to judgment on the demurrer to the first count of the declaration. Then, as to the counts upon the bills of exchange, the argument applies with still greater force. The defendant cannot be permitted to introduce into the contract upon the bills a condition like that suggested. Upon the whole, therefore, the plaintiff is entitled to the judgment of the court.

CROWDER, J.—I am entirely of the same opinion. It seems to me, that, in order to determine this case, we have only to consider what is the operation of the colonial act. That clearly must be confined to suits commenced and prosecuted in India, and can have no operation whatever out of that territory. I agree with my brother Cresswell that this case is entirely disposed of by the two cases of The Bank of Australasia *v.* Nias, and The Bank of Australasia *v.* Harding. There is nothing at all inconvenient or inconsistent with natural justice in this conclusion. The parties are bound by the *terms of the act of the Indian legislature in all proceedings in that country. [*266 But the defendant was bound to know that he was open to the opera-

tion of the law of this country in a suit here upon that which was done by his agent there. Upon the whole, therefore, the declaration must be held good, and the plea bad, and consequently the plaintiff must have judgment on both demurrers.

Judgment for the plaintiff.

It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for arguments.

PHIPSON, on a former day in this term, obtained a rule nisi for a writ in the nature of a mandamus(*a*) directed to the Chief Justice and other judges of the supreme court of judicature at Fort William, in Bengal, for the examination of H. W. Abbott and others, witnesses on the part of the plaintiff, resident at Calcutta and elsewhere within the jurisdiction of the said supreme court, and for a postponement of the trial until the return of the said writ, the costs to be costs in the cause.

John Gray, for the defendant, objected that the rule had been moved prematurely, and that the plaintiff should have waited until after the argument of the demurrers.

CRESSWELL, J.—That is no answer. Rule absolute.

(*a*) Under 13 G. 3, c. 63, s. 44.

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*267] *SNEAD *v.* WATKINS. *Nov.* 21.

Goods brought by a guest to an inn are subject to the innkeeper's lien, though they may turn out to be the property of a third person.

One H., who had formerly been clerk to the plaintiff, an attorney, was subpœnaed as a witness in an action brought by his late employer to recover the amount of a bill of costs. H. put up at a public-house of entertainment at Westminster kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, H. became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against H.:—Held, that the claim of lien was valid.

THIS was an action for the conversion of a blue bag and a letter-book. Pleas, not guilty, and that the goods were not the goods of the plaintiff.

The cause was tried before Wightman, J., at the last Summer Assizes at Oxford. The agreed facts were as follows:—

The plaintiff, an attorney, had brought an action against one Kedge to recover the amount of a bill of costs. One Hulme had been clerk to the plaintiff during the time the bill was incurred, but had left his service before the trial. He was subpœnaed to attend as a witness for the plaintiff at Westminster, and took with him the plaintiff's letter-book and index, in a blue bag.

The witness Hulme, when in London as a witness, put up at the White Hart, Millbank Row, kept by the defendant, and took with him there the blue bag, with the book and index in it, and incurred a bill with the defendant of 2*l.* 15*s.* 8*d.*, made up of 1*l.* 7*s.* 6*d.* money advanced to Hulme, as he said, for witnesses, 19*s.* 2*d.* for refreshments and beer, and 9*s.* for lodging money from the 25th of April till the 7th of May.

The plaintiff gave Hulme 1*l.* 6*s.* before he left Gloucester, and 2*l.* more before the cause was tried. The trial took place on the 28th of April. On the costs being taxed, Hulme was allowed 5*l.* 15*s.* for his expenses as a witness; and the difference was paid to him by the plaintiff's agent.

Hulme did not return to Gloucester: and the defendant claimed to retain the book, index, and bag, on the *ground of a lien upon them for his bill against Hulme during the time he was at his house. [*268

On the 2d of June, the defendant wrote to the plaintiff, stating that Hulme had left his bill unpaid, and that he had applied for it in vain; and that he then held Mr. Snead's large letter-book, which he would forward to him on receiving the amount of the bill.

A demand and refusal (on the ground of lien) were admitted.

In the blue bag there was a cap belonging to Hulme, but which was not claimed by the plaintiff.

The cases of Turrill *v.* Crawley, 13 Q. B. 197 (E. C. L. R. vol. 66), 24 Law Journ. Q. B. 155, and Broadwood *v.* Granara, 10 Exch. 417,† 24 Law Journ. Exch. 1, were cited.

Under the direction of the learned judge, a verdict was taken for the plaintiff for 1*s.*, the defendant giving up the articles claimed in the declaration, and the plaintiff undertaking, in the event of the court deciding in his (the defendant's) favour, to pay the defendant 1*l.* 8*s.* 2*d.*, the amount of his bill less the 1*l.* 7*s.* 6*d.* for money advanced to Hulme: and leave was reserved to the defendant to move for a nonsuit, or that a verdict might be entered for him.

Huddlestone, on a former day in this term, accordingly obtained a rule calling upon the plaintiff to show cause why the verdict found for him on the second issue should not be set aside, and a verdict entered for the defendant, on the ground that, upon the facts admitted, the defendant had a lien on the goods of the plaintiff sought to be recovered in this action. He submitted that the right of the innkeeper is co-extensive with the obligation which the law casts upon him to receive the guest and any goods he may bring with him to the inn: and he adverted to the distinction taken by Parke, B., in Broadwood *v.* Granara,—the case of a piano-forte *lent to a professional pianist whilst staying as a guest at an inn, the innkeeper well knowing it to be the plaintiff's property,—where the learned judge said: "It is not necessary [*269

to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends, is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is, to give him a right *to keep the goods of one person for the debt of another*, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse, he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive the piano-forte." Yorke *v.* Grenaugh, 2 Lord Raym. 866, and Turrill *v.* Crawley, 13 Q. B. 197 (E. C. L. R. vol. 66), show that the innkeeper's lien is not limited to goods which are the property of the guest.(*a*)

W. H. Cooke, now showed cause.—It is not denied that the defendant in this case was in the position of an ordinary innkeeper: the case of Thompson *v.* Lacy, 3 B. & Ald. 283 (E. C. L. R. vol. 5), establishes that. An innkeeper is not bound to receive *all* goods which a guest may wish to bring into the inn: Broadwood *v.* Granara. To entitle the *270] *innkeeper to a lien, it is essential that the possession of the goods be uninterrupted. Hence it is that a *livery-stable keeper* has no lien for the keep of a horse placed at livery in his stables: Orchard *v.* Rackstraw, 9 C. B. 698 (E. C. L. R. vol. 67),—the horse being at all times at the use and command of the owner. (*b*) If the guest goes away, leaving goods behind him, and they are stolen, the innkeeper is not liable. So, if the innkeeper once waives the lien, and treats the demand as a debt, he cannot afterwards resume his claim of lien. In the present case, the letter-book was brought for the purpose of the trial to Westminster Hall. Besides, the defendant's letter clearly shows that the lien was abandoned, and that the claim was treated as a mere matter of debt. [CROWDER, J.—Have you any authority for saying that the innkeeper waives his lien by demanding the debt?] In Jones *v.* Thurloe, 8 Mod. 172, the counsel say that, "by the custom of the realm, if a man lie in an inn one night, the innkeeper may detain his horses until he is paid for the expenses; but, if he give him credit for that time, and let him depart without payment, then he has waived the benefit of that custom by his own consent to the departure, and

(*a*) And see Beedle *v.* Morris, Cro. Jac. 224, Robinson *v.* Walter, Popham, 127, 2 Rolle's Abridgment, *Inns* (A)., pl. 25, Johnson *v.* Hill, 3 Stark. N. P. C. 172 (E. C. L. R. vol. 3).

(*b*) An innkeeper *has* a lien for the standing of a horse,—The Case of an Hostler, Yelv. 66,—if placed in his stable by a guest; Binns *v.* Pigot, 9 C. & P. 208 (E. C. L. R. vol. 38). See Smith *v.* Dearlove, 6 C. B. 132 (E. C. L. R. vol. 60).

shall never afterwards detain the horse for that expense: for, this custom is founded on the hardship of the innkeeper's case to sue for every little debt, or on a greater hardship, that he may not know where to find him who was his guest, after he has gone; therefore when he has waived that privilege which the law gives him, he must rely on his other agreement." [CROWDER, J.—That does not show that a demand of the debt waives the lien. CRESSWELL, J.—There might be some force in the argument, if, in consequence of a promise to pay, the guest has been *allowed to go away.] The main question undoubtedly is, as to the liability of goods of a third party. All the cases upon the subject have occurred with reference to horses and carriages, in respect of which some charge is incurred by the innkeeper in feeding and taking care of them. In Turrill *v.* Crawley, the carriage, which had been brought to the inn by the guest, had been hired by her for a term; and it was held, that the lien, having once attached, would continue notwithstanding that the term for which it was hired was determined. Coleridge, J., says: "The question is, whether the innkeeper has the same lien on a carriage as on a horse. Surely he has the same lien in either case, and on the same principle. Most of the decisions are with respect to horses. This is obviously explainable by reference to the mode of travelling in former times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them. It would be absurd to say that an innkeeper might receive a guest, but refuse to receive his carriage. An innkeeper must now have room for the carriages of his guests; and *he is entitled to charge for the keep and care of them.* He is, *consequently*, entitled to *a lien for the keep and care of a carriage* in like manner as for the keep and care of a horse." And Wightman, J., says: "The innkeeper may charge for the standing of a carriage as well as for the meat of a horse; and his lien is as good in the one case as the other." In Stirt *v.* Drungold, 3 Bulst. 289, it was held that the innkeeper had a lien on the horse for his meat; but some question was made whether he might retain the saddle and bridle as well as the horse. The distinction between living and inanimate chattels is especially noticed in Yorke *v.* Grenaugh, 2 Lord Raym. 866, by three of the judges, who, referring to Stirt *v.* Drungold, held, that, "if a man set his horse at an inn, though he lodge in *another place, that makes him a guest, and the innkeeper is obliged to receive him; for, the innkeeper gains by the horse, and therefore that makes the owner a guest, though he was absent. Contrà, of *goods* left there by a man, because the innkeeper has no advantage of them."(a) The distinction is also recognised in Gelley *v.* Clerk, Cro. Jac. 188, where it was held, that if *a guest* leave his goods with an innkeeper, saying that he will return in three days, and before his return his goods are stolen, he cannot maintain an action on the custom of the

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(a) But see Smith v. Dearlove, 6 C. B. 132 (E. C. L. R. vol. 60).

realm; for, at the time the goods were stolen, he was not *a guest*, and therefore, as the innkeeper could not *gain a profit*, he shall not be liable to *suffer loss*, without a special undertaking. The innkeeper's lien extends only to those things with which a man ordinarily travels. The whole circumstances of this case negative the existence of a lien.

Huddlestone was not required to support his rule.

CRESSWELL, J.—We are all(*a*) of opinion that this is a clear case of lien, and that it is very distinguishable from Broadwood *v.* Granara, 10 Exch. 417.† The bag was brought by the guest to the defendant's house, with some things of his own in it, in the ordinary way. The defendant could have no suspicion that it contained property belonging to any third person. As to the argument that the defendant lost his lien by letting the guest go without paying his bill,—the short answer to that is, that the innkeeper never wants to assert his right of lien until the customer goes off without paying. The rule must be made absolute. Rule absolute.

(*a*) The judges present were,—Cresswell, J., Williams, J., Crowder, J., and Willes, J.

As to the lien of an innkeeper generally, see Dunlap *v.* Thorne, 1 Richardson, 213; Grinnell *v.* Cook, 3 Hill, 486; Peet *v.* M'Graw, 25 Wendell, 653; Carlisle *v.* Quattlebaum, 2 Bailey, 452; Fox *v.* M'Gregor, 11 Barbour, Sup. Ct. 41; Hickman *v.* Thomas, 16 Alabama, 666.

*273] *MATHER *v.* LORD MAIDSTONE. *Nov.* 24.

To a count upon a bill of exchange, by endorsee against acceptor, the defendant pleaded, that he accepted the bill declared on and delivered it to the plaintiff in renewal of a former bill which purported to bear his acceptance, but which he subsequently discovered to be a forgery, of which he gave the plaintiff notice; that there never was any consideration for the drawing or endorsements of the bill, save as aforesaid; and that the plaintiff never gave value or consideration for same, save as aforesaid.

Replication,—that, when the bill alleged to be forged became due, the plaintiff, *then being the lawful holder thereof for value*, caused the same to be presented to the defendant for payment; that the defendant did not pay it, whereupon the plaintiff gave notice of the dishonour to the drawer and endorser; that the plaintiff, when he gave up that bill, had no notice or any reason to believe that it was forged; and that the defendant saw and inspected the bill, and did not allege that it was a forgery until after the lapse of thirty days.

Rejoinder,—that the defendant did not discover that his signature to the first bill had been forged, until after the lapse of the time mentioned in the replication:—

Held, that, upon these pleadings, the proper questions to be tried, were,—whether the bill first mentioned was a forgery,—and whether the plaintiff was the bonâ fide holder thereof for value; and that the onus of proving consideration lay upon the plaintiff.

THIS was an action by endorsee against the acceptor of a bill of exchange. The declaration stated that the Honourable Francis Charles Lawley, on the 17th of March, 1855, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him, the said Honourable Francis Charles Lawley, or his order, 1000*l.*, three

months after date, for value received; that the defendant accepted the said bill, and the said Honourable Francis Charles Lawley endorsed the same to one Edward Rawson Clark, who endorsed the same to the plaintiff; but that the defendant did not pay the same.

Plea, that, before the date of the said bill of exchange in the declaration mentioned, the defendant had accepted two bills of exchange for the accommodation of the Honourable Francis Villiers, each of the said bills being drawn by the said Francis Villiers, and endorsed by the said Edward Rawson Clark, and being respectively for the amount of 1000*l.*, and respectively payable three months after the respective dates thereof; that, after he, the defendant, had so accepted the said two bills of exchange, and before the date of the said bill of exchange in the declaration mentioned, he, the defendant, received and had *notice that a bill of exchange drawn by the said Francis Villiers, endorsed [*274 by the said Edward Rawson Clark, and purporting to be accepted by the defendant, for the sum of 1000*l.*, payable three months after date, had become due and payable, and he, the defendant, was required to pay the same to the plaintiff, who then was the holder of the last-mentioned bill of exchange: that thereupon the defendant, believing that the last-mentioned bill of exchange was one of the said two bills of exchange so accepted by him for the accommodation of the said Francis Villiers as aforesaid, paid to the plaintiff 100*l.* for interest thereon, and accepted the said bill of exchange in the declaration mentioned, in consideration of his supposed liability to the plaintiff upon the said bill whereof he the defendant had notice as aforesaid, and by way of renewal thereof, and for no other consideration whatever: that the said Honourable Francis Charles Lawley drew and endorsed the said bill, and the said Edward Rawson Clark endorsed the said bill of exchange in the declaration mentioned, for and on account of the said bill of exchange whereof he the defendant had notice as aforesaid, and by way of renewal thereof, and not otherwise, nor for any other consideration whatever: that the said bill of exchange whereof he had notice as aforesaid was not either of the bills accepted by him for the accommodation of the said Francis Villiers as aforesaid, and was not accepted by him, the defendant, nor by his authority, but that his name had been written on the said bill without his knowledge, consent, or authority, and that he first discovered that the said bill was not accepted by him, or by his authority, after he had accepted the said bill of exchange in the declaration mentioned, and after the same had been delivered to the plaintiff: and that he, the defendant, then, and within a reasonable time, gave the plaintiff notice that the said bill of exchange whereof he, the defendant, had notice as aforesaid, was *not accepted by him, nor by his authority, and that he had accepted the said bill of exchange in the [*275 declaration mentioned under the mistaken belief as aforesaid, and then demanded the same of and from the plaintiff to be delivered up to him

the defendant, but the plaintiff refused to deliver up the same: and so the defendant said that he accepted the said bill of exchange in the declaration mentioned under the mistaken belief that the said bill of exchange whereof he had notice as aforesaid, was accepted by him, the defendant, and that he was liable to pay the amount of the same; and that he never received any consideration for the acceptance of the said bill of exchange in the declaration mentioned, or for the payment of the same, or of any part thereof, save as aforesaid; and that there never was any consideration for the drawing or endorsements of the said bill of exchange, save as aforesaid; and that the plaintiff never gave any value or consideration for the same, or for any part thereof, save as aforesaid.

The plaintiff joined issue upon the above plea: and, for a second replication thereto, said,—that, when the said bill of exchange drawn by the said Francis Villiers, and endorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, in the said plea mentioned, became due and payable according to the tenor and effect thereof, the plaintiff, *then being the lawful holder thereof for value*, and the same having been and being drawn payable to order, and endorsed in blank by the payee thereof and by the said Edward Rawson Clark respectively, caused the same to be presented to the defendant for payment thereof; but the defendant did not pay the same; whereupon the plaintiff then, and in due time in that behalf, gave due notice to the said Francis Villiers and Edward Rawson Clark respectively of such presentment and dishonour of the last-mentioned bill: that he, the plaintiff, had
*276] not at any *of such times, or at the time when the last-mentioned bill was given up by the plaintiff to or for the defendant as thereinafter mentioned, any notice, nor did he know, or believe, nor had he reason to believe, that the signature of the defendant's name upon the last-mentioned bill, purporting to be his acceptance of the same, was not the defendant's genuine signature and acceptance, or that the defendant was not liable thereon as the acceptor of the last-mentioned bill: that after the said presentment of the last-mentioned bill for payment as aforesaid, and before the same was given up to or for the defendant as thereinafter mentioned, and whilst the plaintiff was the lawful holder thereof, the defendant, at his request, and by the sufferance and permission of the plaintiff, inspected the last-mentioned bill, then having the supposed acceptance of the defendant thereon, and the defendant received and took the same into his hands for that purpose, and did not say or suggest that the said supposed acceptance was a forgery, or that his name had been written on the last-mentioned bill without his knowledge, consent, or authority, or that he was not liable thereon as the acceptor thereof; but complained to the plaintiff that the said Edward Rawson Clark had not renewed the last-mentioned bill before it became due, and then informed the plaintiff that he the defendant had before

then given the said Edward Rawson Clark another acceptance and a check for 100*l.* for the purpose of renewing the same: that the said conduct and behaviour of the defendant on the occasion aforesaid, and his conduct next thereinafter mentioned, respectively, confirmed the plaintiff in his, the plaintiff's, belief that the acceptance of the said bill in this replication first aforesaid was the genuine signature and acceptance of the defendant, and that he was liable thereon as the acceptor of the last-mentioned bill, and induced the plaintiff to act, and the plaintiff did accordingly and in *consequence thereof act, as thereinafter [*277
alleged: that, after the lapse of eight days after the defendant had so inspected the last-mentioned bill, the defendant by and through the said Edward Rawson Clark, his, the defendant's, agent in that behalf, and in consideration of the delivery up to him of the said last-mentioned bill as thereinafter mentioned, delivered to the plaintiff the said bill in the declaration mentioned, so drawn, accepted, and endorsed as therein and herein alleged, and paid to the plaintiff the sum of 60*l.*; and the plaintiff thereupon, at the request of the defendant, by the said Edward Rawson Clark, his agent in that behalf, then delivered to the said Edward Rawson Clark, as and being such agent as aforesaid, who then, as such agent as aforesaid, took and received respectively for and on behalf of the defendant the said bill of exchange in that replication first above mentioned: and that the said bill of exchange so given up by the plaintiff to or for the defendant as aforesaid has never been returned by the defendant or otherwise howsoever to the plaintiff, and the defendant did not give the plaintiff notice, nor did the plaintiff receive notice, nor did he know or believe, nor had he reason to believe, that the last-mentioned bill was not accepted by him the defendant, or by his authority, until thirty days had elapsed after the same had been so as aforesaid delivered to and received by the said Edward Rawson Clark, as such agent as aforesaid.

The defendant joined issue upon the second replication; and, for a second rejoinder, said,—that he did not discover that the signature of his name upon the said bill of exchange so given up by the plaintiff for the defendant as aforesaid, was not his, the defendant's, signature, until the expiration of the said period of thirty days in the second replication mentioned; and that then, when he first discovered the same, he forthwith gave notice thereof to the plaintiff, and then offered to return to the *plaintiff the last-mentioned bill of exchange, and then [*278
tendered the same to the plaintiff, but the plaintiff refused to receive the same; and that, from the time of his, the defendant's, first discovering that the said signature was not his, the defendant's, signature, hitherto, he the defendant had always been ready and willing to return to the plaintiff the last-mentioned bill of exchange, whereof the plaintiff had always during that period had notice: and that, at the time when he offered to return the last-mentioned bill of exchange to the

plaintiff as aforesaid, and tendered the same as aforesaid, and from thence hitherto, the plaintiff might and could have enforced payment of the last-mentioned bill against the said Francis Villiers and Edward Rawson Clark, or any other party to the said bill, and recovered from them the amount thereof, as fully and effectually as he the plaintiff could have enforced payment or recovered the amount thereof at the time when the plaintiff first gave up the last-mentioned bill for the defendant as aforesaid, or any time between that period and the time when the defendant offered to return and tendered the last-mentioned bill of exchange to the plaintiff; and that the plaintiff did not lose, nor was he deprived of, any remedy upon the last-mentioned bill, nor was he nor had he been in any way prejudiced by reason of his having given up the last-mentioned bill of exchange for the defendant as aforesaid, otherwise than as in the said replication and herein appeared. Issue thereon.

The cause was tried before Pollock, C. B., at the last assizes at Guildford. It appeared that Lord Maidstone had, in the year 1852, accepted two bills for 1000*l.* each for the accommodation of Mr. Villiers, which bills had been renewed several times, but, according to the defendant's evidence, ultimately paid; that the bill declared on had been accepted by the defendant, and delivered by him to one Clark,—who acted as a sort of go-between, *but whether as the agent of the plaintiff or of the defendant did not very distinctly appear,—upon the faith *279] of a representation that there was a bill outstanding and about to become due, for the like amount, drawn by Villiers and accepted by the defendant, in the hands of the plaintiff; that the bill in lieu of which the defendant so accepted the bill declared on was shown to the defendant by the plaintiff's attorney, and ultimately given up to the defendant, and was kept by him for about a month without any objection, but at the end of that time was pronounced by him to be a forgery.

Several witnesses who were acquainted with the defendant's handwriting distinctly swore that the acceptance on that bill was not the defendant's.

On the part of the plaintiff, evidence was offered to show that he had given value for the bill of which the bill alleged to be a forgery was one of a series of renewals; but there was considerable confusion as to the identity of the several bills, which ultimately led the jury to discredit the plaintiff's testimony.

The plaintiff's attorney also proved, that, when the bill which was alleged to be forged was first shown to the defendant, he took it up and looked at it, but never suggested that it was not his genuine acceptance; and he further proved, that, on the dishonour of the supposed forged bill, notice of that fact was duly given to the drawer and endorser.

The Lord Chief Baron reported to the Court, that, "in leaving the case to the jury, he told them, that the action was brought upon a genu-

ine acceptance of Lord Maidstone's, and the defence was that it had been given to pay or take up a forged bill; that, although the forgery would have been a ground of defence to an action on the forged bill, it was no defence to an action on the bill with which the forged bill was paid or taken up, if the plaintiff was a bonâ fide holder for value; and that the jury *must find that the defendant had been defrauded out of the bill, and that the plaintiff had not given value, and was not the bonâ fide holder." [*280

The jury found that the defendant had been defrauded, and that the plaintiff had not given value for the bill; and accordingly they returned a verdict for the defendant.

Montagu Chambers, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the learned judge had misdirected the jury in telling them, that, to entitle the plaintiff to recover, it was incumbent on him to prove that he gave value for *the forged bill*,—such question not being in issue or raised by the pleadings, and also on the ground that the verdict was against the evidence.

There being some misapprehension as to how the matter really was left by the Lord Chief Baron, Cresswell, J., on a subsequent day conferred with his Lordship, who stated that the only question at the trial was, as to the consideration given for the bill declared on; for, that, if the plaintiff was not the bonâ fide holder of the forged bill, there was no consideration for this bill.

E. James, Q. C., *Ballantine*, Serjt., and *Holl*, showed cause.—[CRESSWELL, J.—The way in which the Lord Chief Baron puts it seems to get rid of the difficulty. If the plaintiff was not the bonâ fide holder for value of the forged bill, he could not be the bonâ fide holder for value of the bill declared on: and that is distinctly put in issue by the replication, which alleges that the plaintiff was "the lawful holder thereof for value." *Lush* (for the plaintiff).—It is only that which is *material* that is in issue. The giving up of the forged bill may be a sufficient consideration for the renewed bill. CRESSWELL, J.—*The Lord Chief Baron seems to think that a mistake which the plaintiff fell into in giving his evidence, led to a misapprehension of the real facts, and that there ought to be a new trial.] The defendant's case was substantially this,—The bill declared on was dated the 17th of March, 1855. That was a genuine bill; but it was accepted by the defendant, and handed over by him (through Clark) to the plaintiff in substitution for a bill which Clark represented to be a genuine acceptance at three months from the 16th of December, 1854, and which consequently would become due on the 19th of March, 1855, but which turned out to be a forgery. The plaintiff, in substance says,—I was the bonâ fide holder for value of that bill, and by your laches I have lost my remedy against the drawer and endorser, and that gives me a remedy against you on the substituted bill. When this case was before the [*281

court on demurrer,—18 C. B. 273,—Jervis, C. J., said: "As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity; and, when the bill is presented, if the acceptor pays it, the money cannot be recovered back, if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery. Can it make any difference, that, instead of paying money for the bill, he takes the bill, examines it, and gives another acceptance in lieu of it?" And Cresswell, J., said: "A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and it afterwards turned out to be a forgery; he cannot afterwards be permitted to say that he paid the money under a mistake. I apprehend the same result must follow, if, in lieu of money, a fresh acceptance is given; and particularly where the party has retained the instrument in his hands so long as the defendant has done in this case. From the cir-
*282] cumstances disclosed on this *record, the law will infer a loss to the plaintiff." No complaint is made of that decision upon the then state of the record. But the important question here is, what was the substantial issue the parties went down to try? The material allegations on the part of the plaintiff are, that he was the lawful holder for value, and had no notice or knowledge at the time of giving up the bill to the defendant that the signature thereto purporting to be the defendant's was not his genuine signature. The plaintiff attempted to prove that he was the holder for value of the forged bill. That was the real and substantial issue to be tried; and as to that the proof failed. The bill being tainted, the onus of proving value given for it clearly lay on the plaintiff: Bailey *v.* Bidwell, 13 M. & W. 73,† 2 D. & L. 245; Berry *v.* Alderman, 14 C. B. 95 (E. C. L. R. vol. 78). [COCKBURN, C. J.—The plaintiff will contend that the bill declared on is not tainted.] The same principle equally applies: the plaintiff is substantially suing upon the forced acceptance. Besides, as the plaintiff thought fit to take upon himself the burthen of proving that he was the bonâ fide holder for value, the learned judge was well warranted in assuming that that was the true issue between the parties; and it is not competent to the plaintiff now to dispute it: Martin *v.* The Great Northern Railway Company, 16 C. B. 179 (E. C. L. R. vol. 81).

Montagu Chambers, Q. C., and *Lush*, in support of the rule.—The Lord Chief Baron clearly misdirected the jury, in so putting it to them as to cast the burthen of proof upon the wrong party. The statement in the replication, that the plaintiff was the lawful holder for value of the bill of the 16th of December, 1854, was wholly immaterial. It was not an affirmative allegation which the plaintiff was called upon or bound to prove. The real issue was, whether the plaintiff had not, when he
*283] gave up the bill which is alleged to have been forged, a *remedy against Villiers and Clark upon it, which remedy he lost by the

defendant's conduct. If he had, the judgment of this court upon the demurrer is conclusive of the question. In Cocks *v.* Masterman, 9 B. & C. 902 (E. C. L. R. vol. 17), 4 M. & R. 676, a bill purporting to have been accepted by A. was presented to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount, but, on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money. In giving the judgment of the court, Bayley, J., says: "We give no opinion upon the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that, if he receive the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit; and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege." Then, as to the consideration,—but for the mistake which the plaintiff made in describing one of the series of bills with the defendant's acceptance which had passed through his hands, the jury could have had no difficulty in coming to the conclusion that he had given full value for the bill (whichever it was) of which he took upon himself to show that he was the bonâ fide holder. He ought, therefore, to have an opportunity of correcting that blunder before another jury.

*COCKBURN, C. J.—I am of opinion that this rule must be discharged. In the first place, I think there was no misdirection [*284 on the part of the Lord Chief Baron. The plaintiff brings his action upon a bill of exchange alleged to have been drawn by one Lawley upon and accepted by the defendant, and endorsed by Lawley to Clark, and by Clark to the plaintiff. The defendant admits the acceptance, but says that there was no consideration for that acceptance but the giving up to him by the plaintiff of another bill which purported to bear his acceptance, and which he believed at the time to be his genuine acceptance, but which he afterwards discovered to be a forgery, whereof he immediately, and within a reasonable time, gave the plaintiff notice. The plaintiff, in answer to that, replies, that, when the forged bill became due, he, *then being the lawful holder thereof for value*, and having no notice or knowledge that it was a forgery, caused the same to be presented; that the defendant inspected the last-mentioned bill, and, instead of declining to pay the bill on the ground that it was forged, informed

the plaintiff that he had given Clark another acceptance in renewal of it; that the defendant's conduct confirmed the plaintiff in his belief that the acceptance was genuine; and that the plaintiff had no notice that the bill was a forgery, until after the lapse of thirty days after he had delivered it up to the defendant,—whereby the plaintiff was delayed in his remedy against the drawer and endorser, and which delay he relies on as an answer to the defendant's plea. The plaintiff thus raises the question whether or not he was the bonâ fide holder for value of the first bill; which was left, and, as I think, properly left, to the jury. It is said that the Lord Chief Baron ought to have told the jury that the onus lay upon the defendant to prove that the plaintiff was not the bonâ fide holder for value, and not upon the plaintiff to prove that he was, for that the circumstances at all events raised a presumption in the *285] plaintiff's favour that he was a *holder for value. I do not think the principle contended for on the part of the plaintiff has any application here. Such a presumption can only arise in the case of a genuine instrument. If once you show a bill tainted with illegality or fraud, the presumption of bona fides which ordinarily arises from the endorsement ceases. A fortiori where you show that the instrument is forged. I therefore think that the Lord Chief Baron was quite right in holding that the onus lay on the plaintiff, and that he was bound to prove the allegation in his replication that he was the holder of the bill for value.

Then, as to the evidence,—I cannot say that the jury were not perfectly warranted in finding as they did. The plaintiff, having notice that the bill the giving up of which formed the consideration for the defendant's acceptance of the bill declared on, was a forgery, ought to have come prepared with a full and complete explanation of the circumstances under which he became possessed of it. He had ample opportunity to give such explanation; and I think the jury were justified in presuming strongly against him when he failed to make it out. It is suggested that he fell into a mistake. There is no affidavit of that: the application is simply on the ground that the verdict was against the evidence, not of surprise. It being admitted, then, that the plaintiff fell into a grievous mistake, I cannot see how it can be contended that the jury, upon the evidence as it stands, were not warranted in coming to the conclusion they came to: and the application not being in a form to enable us to give the plaintiff relief on any other ground, I think we should not be justified in sending the cause down again.

CRESSWELL, J.—I am entirely of the same opinion. First, as to the direction of the Lord Chief Baron to the jury,—it is said that he was wrong in leaving it to them to inquire whether the bill which was given *286] up as the *consideration for the renewed bill,—the bill declared on,—came to the hands of the plaintiff as a bonâ fide holder for value. Upon the pleadings I think that question certainly did arise.

The plea in substance states that there was no consideration for the defendant's acceptance of the bill declared on, by reason of the fact of the bill in substitution for which it was given being a forgery. The plaintiff, in substance, replies that the defendant had consideration for his acceptance; for, that he, the plaintiff, was the bonâ fide holder for value of that bill, and delivered it up to the defendant in exchange for the bill declared on, and that the defendant kept it, so that the plaintiff lost his remedy against the drawer and endorser. I think it is impossible to say that upon that replication the question whether not the plaintiff was the bonâ fide holder for value was not in issue. The true question is, as to what was the evidence necessary to sustain the affirmative of that issue. There was indisputable evidence that the bill of the 16th of December, 1854, was a forgery. Did that cast upon the plaintiff the onus of proving that he was the bonâ fide holder for value? Take the old case of endorsee against acceptor, with a plea of the general issue. At the trial the plaintiff would produce the bill, which would be primâ facie evidence of value. The defendant then shows fraud. This casts upon the plaintiff the necessity of proving that he was a bonâ fide holder for value,—the bill being tainted. Is not the bill as much tainted by showing that a felony has been committed with respect to it, so as to call upon the holder to prove consideration? Mr. *Lush* has argued very ingeniously that the defendant, by doing that which is tantamount to paying the bill, has materially altered the position of the plaintiff. It does not, however, appear to me that the plaintiff's position is at all altered with reference to this issue. With regard to the case of Cocks *v.* Masterman, and that *class, it is to be observed that it was taken for granted that the parties were bonâ fide holders for [*287 value. Payment could have no other effect than to raise a presumption of the genuineness of the bill. As to the evidence, I entirely concur with the Lord Chief Justice in thinking that there is no ground, framed as this motion is, for sending the cause down to a new trial.

CROWDER, J.—I am of the same opinion. As to the first point, I think there clearly was no misdirection on the part of the learned judge. The real question to be decided by the jury upon these pleadings, was, whether or not the plaintiff was the bonâ fide holder for value of the forged bill. The defence set up by the plea, is, that the bill declared on was accepted by the defendant for the purpose of renewing a former bill which was represented to bear his signature as acceptor, but which he subsequently discovered to have been forged. To this the plaintiff replies, though true it is that that former bill was forged, you had consideration for the giving of the bill declared on, by my giving up the forged bill, of which I was the bonâ fide holder for value, and my remedies thereon against the drawer and endorser. When this case was before the court upon demurrer, the question was whether the defendant was not estopped by his conduct in not at once repudiating the forged

bill, from setting up this defence. According to Mr. *Lush's* argument to-day, the plea would have been bad for not negativing that the plaintiff was a bonâ fide holder for value. The court suggested, on the first argument, that the replication was bad for not averring that the plaintiff was the bonâ fide holder for value: and the replication was amended accordingly. The real question, therefore, the parties went down to try, was, whether or not the plaintiff was the bonâ fide holder for value of that forged bill. It is now said that the Lord Chief Baron misdirected the jury; for that he *should have told them to find for the plaintiff unless they were of opinion that the defendant had established the fact of the forgery of the bill of the 16th of December, 1854, and that the plaintiff was not the bonâ fide holder for value. I am, however, of opinion that the direction of the Lord Chief Baron was perfectly right. I entirely agree with my Brother Cresswell as to the rule of law in the case of a bill tainted with fraud or illegality: and the rule applies with equal force to the case of a bill which is forged. No implication arises in favour of the holder of a forged bill. If he attempts to take the benefit of it as a valid instrument, it lies on him to establish his right to maintain an action upon it, by showing that he took it bonâ fide and for value.

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As to the evidence,—I own I should have been inclined to agree with the Lord Chief Baron that there ought to have been a new trial, if the plaintiff had shown by affidavit that he had fallen into a mistake in giving his evidence. He has not, however, done so: and, upon the evidence as it stands, I cannot see that the jury came to a wrong conclusion. Rule discharged.

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*289] *PROSSER, Administrator of ROBERT SLOLEY, deceased, *v.* WAGNER and Another. *Nov.* 26.

Semble, that payment of a debt to an administrator to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing.

The court refused to stay the proceedings in an action at the suit of an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed executrix, had intimated her intention to bring to this country to prove.

THIS was an action brought by the plaintiff, as administrator of Robert Sloley, deceased, to recover a sum of 330*l.* for money alleged to have been received by the defendant in the lifetime of the intestate, and also for money received after his death; with a count in trover. Pleas to the indebitatus counts, never indebted, and payment; and to the count in trover, not guilty, and that the goods were not the property of the plaintiff.

Upon affidavits stating, that Sloley had formerly resided in Calcutta,

but returned to England, and died in London on or about the 26th of June last; and showing, from statements made by him a short time before his death, and from letters since received from his wife in Calcutta, that he had left a will there, whereof he had appointed his wife and one Braddon executrix and executor; and that the widow intended to come to this country to prove the same,

Phipson, on a former day in this term, moved for leave to add a plea to the effect that Sloley had made a will, and appointed executors, and that they had not renounced probate thereof; or that the proceedings in this suit might be stayed until the will should be proved. It is true, it was held in Allen *v.* Dundas, 3 T. R. 125, that a probate, as long as it remains unrepealed, cannot be impeached in the temporal courts; and that payment of money to an executor who had obtained probate of a forged will, was a discharge to the debtor of the intestate, notwithstanding the probate was afterwards declared null, and administration was granted to the intestate's next of kin. But letters of administration stand upon a different footing: the grant of probate is a judicial act of a *court having competent jurisdiction; the taking out administration is the act of the party. [WILLES, J. [*290 —Could you not have pleaded ne unques administrator?] That seems doubtful. [WILLES, J.—There was a case of the sort in the Exchequer recently, where the plea is set out in extenso.] Stokes *v.* Bate, 5 B. & C. 491 (E. C. L. R. vol. 11), 8 D. & R. 247 (E. C. L. R. vol. 16), is to the same effect. In Com. Dig. *Administrator* (B. 10), it is said: "If administration be granted upon the concealment of a will, and afterwards the will appears, all mesne acts by the administrator are void: Pl. Com. 280; Abram *v.* Cunningham, 2 Lev. 182:(*a*) though the executor refuse, and do not prove the will when it is produced; for, the administration was void, and cannot be of effect by the refusal of the executor afterwards: vide Show. 411." [WILLIAMS, J.—Suppose the executors set up the will, and the ecclesiastical court granted letters of administration,—could you raise the point, and try the validity of the will by a jury?] Probably not. In Hensloe's Case, 9 Co. Rep. 40 b, 41 a, it is said: "It is worth observation for the reason of the principal case, how probate of wills and granting of administrations shall be tried, if they are traversed or denied in the King's courts; and, therefore, if issue be joined in the King's courts, that the ordinary did not commit administration to the plaintiff, &c., or that the will is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted as of one who died intestate, made a will, &c., in none of these cases it shall be tried or certified by the ordinary, as in the case of excommengement, but it shall be tried by jury, because these

(*a*) S. C., 1 Freem. 445, 1 Vent. 363, 2 Mod. 146, T. Jones, 72, 3 Keb. 725.

two cases of probate of wills, and constituting administrators, originally did not belong to the conusance of ecclesiastical judges, but were given them of later times; and therefore nothing but the probate, and
*291] *granting of administration, which were given them, belong to their jurisdiction; but the trial of them is not given to them, but is left to the trial of the common law." [WILLIAMS, J.—If you object to the letters of administration, must you not go to the proper court to get them recalled?] In Com. Dig. *Administrator* (B. 1.), it is said, that, "if a man make a will and an executor, administration granted before probate, or refusal, is void, if the will be afterwards proved; though it was concealed, and not known at the time of administration granted." Buller, J., in Allen v. Dundas, says: "This case was compared to a probate of a supposed will of a living person; but, in such a case, the ecclesiastical court has no jurisdiction, and the probate can have no effect. Their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but, where they have no jurisdiction, their whole proceedings are a nullity." The statute 31 Ed. 3, c. 11, only gives the ordinary jurisdiction to grant letters of administration in cases of intestacy. It appearing, therefore, in this case, that there is a will, the court will stay the proceedings until it is properly proved. In Williams on Executors, 4th edit., p. 488, treating of the effect of revocation of probate or letters of administration, the learned author says: "The first important distinction on this subject, is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation, shall be of no validity: as, if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; nor can they, although the executor
*292] should refuse to act, be made good by *relation,"—citing Abram v. Cunningham. A payment to the administrator here would clearly be no answer to an action at the suit of the executrix when she has proved the will.

CRESSWELL, J.—I think there is no pretence whatever for granting the first part of the rule. But, as to the rest, the rule may go for a stay of the proceedings, upon the defendant's bringing 330*l.* into court within a week.

WILLIAMS, J.—I think the proposed plea would clearly be a bad one: and I am surprised that any effort should be made to have it added. The fact of the existence of a will can only be ascertained by probate.

Collier, Q.C., now showed cause.—There is no ground whatever for this application. The affidavits in opposition to the rule disclose circumstances which render it extremely unlikely that any person will be rash enough to prove the will, if any exists. It appears that the plaintiff was a judgment-creditor of the deceased, Sloley, to the amount of 6440*l.*; that, some time in the year 1856, Sloley absconded from Calcutta with property belonging to the plaintiff of the value of 2000*l.*; that, in June last, the plaintiff followed him to England, and traced him to the house of the defendant Wagner (whose wife, through the defendant, as her trustee, carried on the business of a boarding and lodging-house keeper in Charlotte-street, Fitzroy-square), where he found that Sloley had died a few hours before; that, on Sloley's decease, the defendant Wagner took possession of his effects, consisting, as the deponent believed, of upwards of 300*l.*, besides several gold watches and other articles of jewellery, which Wagner showed to the plaintiff, but refused to deliver up to him in consequence of his not then having obtained letters of administration; and that, *after the plaintiff had obtained letters of administration, viz. on the 12th [*293 of September last, he again demanded the property of the defendant Wagner, who again refused to give it up to him. It is perfectly clear, that, if the defendants pay and deliver up the property in question to the administrator, they cannot be called upon to pay over again. The authorities upon the subject are distinct. In Williams on Executors, p. 492, it is said: "It must be observed, that, whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a bonâ fide payment to the executor or administrator of a debt due to the estate will be a legal discharge to a debtor. With respect to payments to an administrator, in a case as early as the time of Charles the Second, the administrator of the lessee paid rent to the administrator of the lessor: the latter administration was repealed, and granted to D., who sued at law, as well for the rent paid to the former administrator of the lessor, as for rent since due, and got a verdict and judgment against the administrator of the lessee for the same; but the defendant was relieved in equity as to the rent paid, because he had paid it to the visible administrator. Stevens *v.* Langley, Finch, 40. And in a modern case it was held that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the ecclesiastical court (citing Allen *v.* Dundas); on the principle, that, if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it," —referring to Woolley *v.* Clarke, 5 B. & Ald. 746 (E. C. L. R. vol. 7),

Phillips *v.* Biron, 1 Stra. 509, Digby *v.* Wray, Bac. Abr. *Executors* (F. 3.), pl. 13, and Ex parte Jolliffe, 5 Beavan, 163. [WILLIAMS, *294] *J.—There might be some ground for asking the court to stay the proceedings, if it were shown that the defendants were about to take steps for setting aside the letters of administration.] There is no suggestion of that sort; neither is the defendants' liability, or the extent of it, disputed. Suppose the plaintiff is wrong, he may be responsible to the executors when the will is proved: but that is no concern of the defendants'. [COCKBURN, C. J.—I think we had better hear upon what ground it is that Mr. *Phipson* hopes to support his rule.]

Phipson.—The ground upon which the defendants insist that the proceedings in this action ought to be stayed, is, that they cannot safely part with the property after the intimation they have received from Sloley's widow that there is a will, and that she means to prove it. In Allen *v.* Dundas, the payment was made in ignorance of the existence of a will. [CROWDER, J.—When the rule was granted, I certainly was under the impression that the defendants could not discharge themselves by payment to the administrator. But that is not so. You cannot gainsay the letters of administration: you cannot plead the will: therefore you are excused.] No case has gone the length of holding that a party who has notice of a will, and of the executor's intention to prove it, is justified in yielding to a demand by one claiming under void letters of administration. [COCKBURN, C. J.—I think it is very unlikely that the widow will prove the will, when she finds that there is a creditor whose demand will swallow up the whole of the assets.] The defendants ought not to be placed in jeopardy.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. If the effect of a recovery in this action would have been to leave the defendants still liable to the executrix in case she should prove the *295] will, there *might have been some ground for seeking the aid of the court. But I am satisfied that a payment to the administrator would be a discharge. I therefore see no reason why we should interfere to prevent the administrator from proceeding with the action.

WILLIAMS, J.—I also am of opinion that the rule should be discharged: indeed, it ought never to have been granted. I thought at the time that there was an intention on the part of the defendants to get the letters of administration recalled, and that it might be convenient to grant a short delay for that purpose. But, upon further consideration, I entertain grave doubts whether we should be justified in staying the proceedings, even if such a state of facts could be shown. Where letters of administration have been improperly obtained or improvidently granted, the proper and only course is, to go to the ecclesiastical court to get them revoked.

The rest of the court concurring,

Rule discharged, with costs.

Where an administrator is legally appointed, and a will of the decedent is subsequently discovered, in which an executor is named, this operates only as a repeal of the grant of letters of administration. The acts of the administrator, as such, before the discovery, are valid. Bigelow *v.* Bigelow, 4 Hammond, 138; Kittridge *v.* Folsom, 8 New Hampshire, 98; Burnley *v.* Duke, 2 Robinson, 102; Fisher *v.* Bassitt, 9 Leigh, 119; Price *v.* Nesbit, 1 Hill, Ch. 445.

*PRICKETT *v.* BADGER. *Nov.* 20. [*296

Where an agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority.

In such a case, a contract to pay what is reasonable is implied by the law: it is not a question for the jury.

Semble, per Willes, J., that, under such circumstances, the proper measure of damages would be the entire amount of the commission agreed for.

THIS was an action for work and labour, and for money alleged to be due upon an account stated. Plea, never indebted. The writ was issued on the 4th of June, 1856.

The particulars of demand were as follows:—

"To attending you in Southampton Buildings, receiving instructions to dispose of by private contract about 14 acres of freehold land in the Seven Sisters Road, Holloway, Middlesex, at 650*l.* per acre; meeting you on the ground, when you pointed out the same; making plan to a large scale; attending applicants with particulars and terms; and ultimately forwarding you an offer that we had received of 700*l.* per acre,—commission, as agreed, at 1*l.* 10*s.* per cent. . . . . £143 5 0"

The cause was tried before the Lord Chief Baron, at the last Assizes at Guildford. The facts were as follows:—The plaintiff was a house and estate-agent. The defendant is lord of the manor of Highbury. In the month of July, 1852, the defendant called upon the plaintiff, and, according to the plaintiff's evidence, representing that he had an interest in a piece of land containing about fourteen acres, parcel of the manor, proposed to the plaintiff to look out for a purchaser at the price of about 650*l.* per acre. The plaintiff agreed to do so, at the

same time telling the defendant that his terms would be a commission of 1½ per cent. upon the amount of purchase-money. The plaintiff
*297] immediately set about preparing *a plan and advertisements, wrote letters to and had communications with several persons, and ultimately, in November in that year, received an offer of 675*l.* per acre from the Birkbeck Land Society. The defendant then for the first time informed the plaintiff that he had no interest in the land, but that it belonged to one Wagstaffe; and Wagstaffe at first stated that he himself had not completed the purchase of the land, and afterwards declined to sell it to the Birkbeck Land Society: and, in January, 1853, the plaintiff was desired by Wagstaffe to take no further steps in the matter. On cross-examination, the plaintiff admitted that he had been informed by Wagstaffe in September, 1852, that *he* had an interest in the land, and that it could not be sold without him.

At the close of the plaintiff's case, it was submitted on the part of the defendant that the action was wrong in form; for that the plaintiff's own evidence showed that the only contract (if any) between the parties, was, a special contract for a commission of 1½ per cent. on his accomplishing a sale of the land, as stated in the particulars; and that the action should have been a special action for wrongfully withdrawing the authority to sell.

The Lord Chief Baron overruled the objection,—holding that it was competent to the plaintiff to sue upon a quantum meruit: and he likened the case to that of a man, who, having a house which he is desirous of letting or selling, places it in the hands of several house-agents; in which case, he said, that, though the successful agent alone would be entitled to claim commission, the others would clearly be entitled to something for their trouble.

The defendant and Wagstaffe were then called. The former stated, that, though he had told the plaintiff that the land in question was for sale at about 600*l.* or 700*l.* per acre, he never asserted that it was his, or that he had any interest in it, and never employed him to offer it
*298] for sale; that the land had never been sold; and that no *demand in respect of commission or otherwise was ever made upon him by the plaintiff until the year 1855. And Wagstaffe stated that neither the plaintiff nor any one else had any authority from him to offer the land for sale.

In leaving the case to the jury, the Lord Chief Baron told them, that, though the plaintiff was not, under the circumstances, entitled to the 1½ per cent. commission, he was still entitled to recover a reasonable remuneration for his services.

The jury returned a verdict for the plaintiff, damages 50*l.*; and his Lordship directed the judgment and execution to be stayed until the fifth day of the ensuing term.

Montagu Chambers, Q. C., on a former day in this term, obtained a

rule nisi for a new trial on the ground of misdirection, and also that the verdict was against the evidence. He submitted that the action was misconceived; that the only contract alleged, and attempted to be proved, was, a special contract for a commission of 1½ per cent. conditional on the sale being effected through the plaintiff's agency: and he referred to Moffatt *v.* Laurie, 15 C. B. 583 (E. C. L. R. vol. 80). There, the declaration stated that A., being possessed of certain land, and the plaintiff being an architect and surveyor, it was agreed between them that the plaintiff should lay out the said land for building purposes, viz. that he should make all the necessary surveys, plans, &c., and that the plaintiff undertook the whole of the above on the following conditions,—*that he make A. no charge whatever for the above services*, but that, *in the event of any of the land being disposed of for building purposes*, the plaintiff should be appointed architect on A.'s behalf to see that the construction of the works was substantial, &c., and that parties building on the land should pay the plaintiff 1½ per cent. on the outlay, providing they did not employ the plaintiff as *their architect: but that, *in the event of A. or his executors wishing* [*299 *to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, on the understanding that he or they remunerate the plaintiff for the time, trouble, and expense he had been put to in making the said preparations.* It then averred that the plaintiff made the necessary surveys, plans, &c,, and incurred expenses therein; and that the said land was not, nor was any part thereof, disposed of for building purposes according to the said agreement, although a reasonable time for such disposal of the same had elapsed; and that after the death of A., the defendants, as his executors, dispensed with the further services of the plaintiff in respect of the said contract, and wholly released and discharged him from any further performance of the same, and hindered and prevented themselves from disposing, and put it out of their power to dispose of the said land, or any part of it, for building purposes; and that thereupon there became and was due and payable to the plaintiff from the defendants, as executors, a large sum for his trouble in preparing the surveys, plans, &c. And it was held, that the declaration showed no cause of action, inasmuch as the event on the happening of which alone the plaintiff was to be entitled to remuneration for his services, viz. *the disposal of the land for building purposes*, had not happened. [WILLES, J., referred to De Bernardy *v.* Harding, 8 Exch. 822,† and CRESSWELL, J., to Simpson *v.* Lamb, 17 C. B. 603 (E. C. L. R. vol. 84).]

Shee, Serjt., and *Hawkins*, on a subsequent day, showed cause.—The direction of the Lord Chief Baron was in strict conformity with the authorities, and particularly with those in this court. There is no pretence for saying, that, because no sale was effected, therefore the plaintiff is to recover nothing: and there was abundant evidence of valuable

*300] services rendered, in preparing a *plan and advertisements, entering upon negotiations with persons willing to become purchasers, and the like. If in Simpson v. Lamb it had appeared that the agent had incurred expense or bestowed labour in endeavouring to effect a sale, the judgment of the court shows that he would have been held entitled to recover for that, notwithstanding the action was in form brought for a wrongful revocation of the authority to sell. So, in De Bernardy v. Harding, the defendant being about to erect seats for viewing a public funeral, entered into an agreement with the plaintiff, a foreign agent, to make the scheme known abroad, and dispose of tickets for the seats. The plaintiff was to be paid for his work and expenses by a per-centage on the tickets which he sold. After the plaintiff had incurred certain expenses, but before he sold any tickets, the defendant desired him not to dispose of them, as he would sell them himself. The plaintiff accordingly sent all applicants for tickets to him, and after the funeral delivered to the defendant a bill for work done and expenses incurred. The defendant paid the expenses, but refused to pay for the work. And it was held by the Court of Exchequer, that it was a question for the jury whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that the plaintiff should be paid for the work actually done, as upon a quantum meruit. "Where one party," says Alderson, B., "has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract, and sue on a quantum meruit for the work actually done." In Planché v. Colburn, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott, 51 (E. C. L. R. vol. 28), the defendants engaged the plaintiff to write a treatise for a periodical publication: the plaintiff commenced the treatise, but, before he had completed it, the

*301] defendants abandoned *the work: and it was held, that the plaintiff might sue for compensation, without tendering or delivering the treatise. Neither Moffatt v. Laurie, which was cited on the application for this rule, nor the previous case of Moffatt v. Dickson, 13 C. B. 543 (E. C. L. R. vol. 76), at all militates against the ruling in this case. The simple question here is, what implied contract arises, where a special contract for the payment of a given commission on effecting a sale, is improperly rescinded after something has been done towards performance of it by the agent. Clearly, the contract implied by the law, under these circumstances, is, a contract to pay a reasonable remuneration for the services actually rendered. [CROWDER, J.—All the work done here was done under the special contract.] The fact of its having been done with a view to the special contract does not prevent the plaintiff from recovering as upon an implied contract. [WILLES, J.—I have just sent to ask the Lord Chief Baron if he was satisfied with the verdict; and he tells me that he was not.] The ver-

dict was entirely in conformity with his Lordship's direction; and he certainly evinced no dissatisfaction with it at the time it was delivered. [CROWDER, J.—It does not strike one as being very likely that a man would make such a contract as this in respect of land in which he had no interest.] There was evidence both ways: and, the jury (a special jury) having thought the balance in favour of the plaintiff, the court will not disturb their verdict, merely because the learned judge would have been equally satisfied had it been the other way.

Montagu Chambers, Q. C., and *Hance*, in support of the rule.—This was a clear case of misdirection. The learned judge distinctly told the jury that they might, if they thought proper, give the plaintiff a reasonable remuneration for the work done, instead of telling them, as he ought to have done, that the plaintiff's only remedy *was, by an action for wrongfully revoking the authority given by the special [*302 contract,—as was said in Simpson *v.* Lamb, 17 C. B. 603 (E. C. L. R. vol. 84). [WILLES, J.—We may amend the declaration now, if necessary: see Walker *v.* Bartlett, 17 C. B. 858 (E. C. L. R. vol. 86).] An amendment of that sort would be placing the defendant in a different and less advantageous position than he was in at the trial. The general rule is, that, where there is a special contract, no action will lie as upon an implied contract arising out of the same transaction. In 2 Smith's Leading Cases, 15, it is said: "There is a numerous class of cases which establish the general proposition, that, while a special contract remains open, *i. e.* unperformed, the party whose part of it is unperformed, cannot sue in indebitatis assumpsit to recover a compensation for what he has done, until the same is completed. This principle is affirmed and acted on in Cutter *v.* Powell; it was also the ground of the decision in Hulle *v.* Heightman, 2 East, 145." Here, the plaintiff stipulates for a large remuneration in a given event, taking his chance of obtaining that or nothing. [CROWDER, J.—He obtained an offer from one who was willing to purchase the land at a higher price than the plaintiff expressed his willingness to take. What more could he do?] The offer was not obtained until after the plaintiff had had notice that the land was Wagstaffe's. The work done, therefore, was done in endeavouring to obtain a purchaser for Wagstaffe. The case strongly resembles Cutter *v.* Powell, where it was held, that, if a sailor hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a quantum meruit. [WILLIAMS, J.—It did not appear there that the performance of the contract was prevented by the tortious act of the defendant.] But in Hulle *v.* *Heightman, it did not appear that the plaintiff was prevented from performing [*303 the contract by the tortious act of the defendant. In the notes to Cutter *v.* Powell, 2 Smith's Leading Cases, 4th edit., 19, it is further

said,—" In Read *v.* Rann, 10 B. & C. 439 (E. C. L. R. vol. 21), recognised in Broad *v.* Thomas, 7 Bingh. 99 (E. C. L. R. vol. 20), 4 M. & P. 732, the doctrine of Cutter *v.* Powell, Hulle *v.* Heightman, and Sinclair *v.* Bowles, 9 B. & C. 92 (E. C. L. R. vol. 17), 4 M. & R. 1, was again acted upon. In that case, a ship-broker brought an action for commission for procuring a charterer for the defendant's ship. It was proved to be a custom in the city, that, in such cases, if the bargain was perfected, the commission was 5 per cent., but, if the bargain went off, nothing was payable; and here it had gone off. The plaintiff was nonsuited. 'The claim of the plaintiff,' says Parke, J., 'rests on the custom, not on a quantum meruit. The custom presupposes a special contract, and, if that is not satisfied, no claim at all arises, for no other contract can be implied. In *some* cases, a special contract not executed may give rise to a claim in the nature of a quantum meruit, ex. gr. where a special contract has been made for goods, and goods sent not according to the contract have been retained by the party, there a claim for the value on a quantum valebant may be supported. But then, *from the circumstances a new contract may be implied.*'" Here, there was no rescinding of the contract by the defendant. The matter went off because the real owner of the land (Wagstaffe) refused to sell it. [CROWDER, J.—Does it matter by what sort of default it was that the plaintiff was prevented from receiving the stipulated remuneration?] It might be that the defendant was responsible in a special action for damage resulting to the plaintiff from his false representation that he had authority to sell the land,—Polhill *v.* Walter, 3 B. & Ad. 114 (E. C. L. R. vol. 23). At all events, it should have been left to the jury to say whether or not the special contract had been *rescinded. [CROWDER, J.—Is that so? And, if it were, how could the jury help inferring a contract, under the circumstances, to pay for the plaintiff's services so much as they were reasonably worth? WILLES, J., referred to Sanders *v.* Vanzeller, 2 Gale & D. 244.]

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WILLIAMS, J.(*a*)—I am of opinion that there was no misdirection in this case. But I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named, he was to receive a commission of 1½ per cent.; and that the plaintiff bestowed his labour in endeavouring to find, and did find, a purchaser at that price; but that the negotiation failed because the defendant was not prepared to come forward as vendor; and that so the plaintiff was prevented from earning the stipulated commission. If the jury believe these facts to be established, then, according to Planché *v.* Colburn, 8 Bingh. 14 (E. C. L. R. vol. 21), 1 M. & Scott, 51 (E. C. L. R. vol. 28), and other authorities in conformity therewith, the plaintiff was entitled to abandon the special contract, and resort to

(*a*) Cresswell, J., had gone to chambers.

an action founded upon the promise which the law would infer from such a state of facts. That was evidently the view taken by the Lord Chief Baron at the trial. It has been contended that that is erroneous, and that it should have been left to the jury to say whether there was any such implied contract. I think it was not a question for the jury at all. It is true that the Court of Exchequer in De Bernardy *v.* Harding, 8 Exch. 822,† appears to have treated it as a matter for the consideration of the jury: but the decision there is quite consistent with Planché *v.* Colburn; and Alderson, B., distinctly states and approves of the principle of that case. For these reasons, I am of opinion that the *direction of the Lord Chief Baron was quite right, and that there was nothing to leave to the jury. I am anxious it should [*305 not be supposed that the court intends to lay it down as a general rule, that, where an agent is employed to sell property, and his authority is revoked before anything has been done under it, he is at liberty to resort to the common counts for his work and labour in endeavouring to find a purchaser. In such a case, nothing more appearing, if the plaintiff attempted to rely on the quantum meruit, he would probably be met by the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing. But no such answer was or could be set up here, because the plaintiff had actually succeeded in finding a person who was willing to become a purchaser at a price exceeding the price demanded, and was only prevented from carrying out the negotiation by the defendant's inability to convey. With regard to the second branch of the rule, as the Lord Chief Baron has expressed himself not satisfied with the verdict, the cause must go down again, the costs to abide the event.

CROWDER, J.—I also think there was no misdirection in this case. The defendant having declined, from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, the Lord Chief Baron ruled, that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labour. In this I am of opinion he was quite right. His ruling is perfectly consistent with the law as laid down in the notes to the case of Cutter *v.* Powell, in 2 Smith's *Leading Cases, 1. At p. 16, the learned editors say,—"It is an invariably true proposition, that wherever one [*306 of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, *immediately* sue on a quantum meruit for anything which he had done under it previously to the rescission: this, it is apprehended, is established by Withers *v.*

Reynolds, 2 B. & Ad. 882 (E. C. L. R. vol. 22), Planché v. Colburn, 8 Bingh. 14, 1 M. & Scott, 51, Franklin v. Miller, 4 Ad. & E. 599 (E. C. L. R. vol. 31), and other cases." Again, at p. 31, it is said,—"It being, therefore, established, that, where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind; such act or such refusal being equivalent to a consent to the rescission: the remaining part of the proposition above stated, is, that, upon such a rescission, he has a right, if he have done anything under the contract, to sue *immediately* for compensation on a quantum meruit. That he should do so, is consistent with reason and justice; for, it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done, by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must therefore be entitled to sue upon a quantum meruit, founded on a promise implied by law on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action *immediately*. This point is decided by Planché v. Colburn." It is insisted on *the present occa-
*307] sion, that the Lord Chief Baron should have left it to the jury whether under the circumstances a contract for reasonable remuneration was to be implied. It seems to me, however, that that is a question of law, and not a question for the jury. It would be idle to put it to the jury to imply what of necessity they must imply. In De Bernardy v. Harding, it is true, something is said by Alderson, B., as to leaving it to the jury: but the decision does not turn on that. Here, it seems to me, that, under the circumstances proved, a contract was implied by law to pay the plaintiff a reasonable remuneration for his labour, and consequently the direction was correct. I agree with my brother Williams that the ordinary rule as to employing an agent to let or to sell for a certain commission, where the authority is revoked before anything has been done under it, does not apply to the present case. As, however, the learned judge who tried the cause is dissatisfied with the result, it must go down again.

WILLES, J.—I am of the same opinion. The form in which the objection was presented at the trial, was, that the declaration should have been framed specially for a wrongful withdrawal of the authority to sell. That, however, is an erroneous notion. There are many instances in the books which might be cited to show, that, under circumstances like these, the plaintiff may maintain an action upon the money counts. In the case of goods shipped from abroad, to be paid for in three months from arrival, under ordinary circumstances the goods must be paid for

though they never arrive: but, if the shipper by his wrongful act prevents their arrival, the buyer is not bound to pay for them. I entirely agree with my learned Brothers as to the substance of the case. It is quite clear that the plaintiff was entitled to some remuneration. In pursuance of the retainer, he proceeded to find a purchaser for the land; and it was only the *defendant's disinclination or inability to proceed that prevented the sale being completed. The plaintiff [*308 would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount. The learned judge being dissatisfied with the verdict, there must be a new trial, upon the terms suggested.

Rule absolute for a new trial, the costs to abide the event.(a)

(a) See the Common Law Procedure Act, 1854, s. 44. "When a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, *unless the court shall otherwise order.*"

BIRD and Another *v.* MALZY. *Nov.* 24.

The court will not allow interrogatories, under the 51st section of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125), for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents.
Discovery of documents under s. 50.

THIS was an action against the defendant for not delivering according to contract a large quantity of iron shipped by him in this country at different times between the months of January and June last, for the purpose of being conveyed for the plaintiffs to certain ports in the Baltic. The complaint on the part of the plaintiffs was, that the iron so shipped was deficient in quantity and quality. By the terms of the contract, the iron was to be carried at the plaintiff's risk. The plaintiffs furnished the form of the bills of lading on the occasion of each shipment, effected and paid the insurance and freight; and the price of each cargo of iron was payable and paid by the plaintiffs upon receipt of the bill of lading for such cargo duly signed by the captain.

Upon affidavits setting forth the above facts, and also *stating, that the deponent believed, that, in order to be duly prepared for [*309 the trial of the cause, it was necessary that he should obtain information as to how and by whom, and when and under whose superintendence the iron was unloaded at the said several ports, and when and where and by whom it was first weighed and examined, and whether the whole or any and what part of the freight was paid to the captains or owners of the said ships according to the tenor of the several bills of lading, together with such other information respecting the iron, and the discharging thereof, as was required from the plaintiffs by the proposed interrogatories; that

the defendant had no means of obtaining the information he sought, otherwise than from the plaintiffs themselves; that he believed he would derive material benefit in the cause from the discovery sought; that it was not sought for the purpose of delay; that the deponent was informed and believed that the plaintiffs had agents or servants at each of the ports in the Baltic to which the iron, the subject of the contract upon which the action was brought, was to be conveyed, and that the iron was received by such agents or servants upon its arrival at such ports respectively, and that the defendant had no agents or servants at any of the said ports, and had nothing to do with the iron upon or after its arrival at the said ports, or after its shipment; *and that the deponent believed that the plaintiffs had in their possession or power certain letters, certificates, and other documents which they received from their said agents or servants at or soon after the discharge of the said cargoes of iron at the said ports respectively, which letters, certificates, and documents related respectively to the said cargoes*, and to the discharge, conveyance, weighing, and examination thereof on their arrival respectively at the said ports, and that he believed that the said letters, certificates, and other documents would upon inspection furnish valuable and material informa-
*310] tion and evidence in *support of the defendant's case, and would materially assist him in preparing for trial,—

Garth moved for a rule under the 51st section(*a*) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), calling upon the plaintiffs to show cause why the defendant should not be at liberty to deliver to them, or to their attorney, interrogatories in writing, and why the plaintiffs should not within ten days answer the questions in writing, by affidavit, pursuant to the act,—Or, under s. 50, why the plaintiffs should not answer on affidavit stating what documents they or either of them had in their possession or power relating to the matters in dispute in this cause, or what they respectively knew as to the custody the same or any of the same were in, and whether they or either of them objected to the production of such as were in their possession or power, and, if so, on what grounds. [COCKBURN, C. J.—As to the first branch of the motion, is not all you seek within the knowledge of your own agent?
*311] The vessels were selected by *you. The master, who is your agent, must know as much of the matter as anybody.] If we knew the names of the persons who unloaded and received the cargoes,

(*a*) Which enacts, that, "in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the court or a judge may at any other time deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly."

we might apply for a commission to examine them. [COCKBURN, C. J. —Have you asked for their names?] No. In allowing interrogatories under the 51st section of this act, the courts are guided by the rules which govern courts of equity in giving discovery. Now, the objects of courts of equity in compelling discovery, are thus stated in Wigram on Discovery, 2d edit. p. 2,—"A bill in equity generally requires, and the court enforces, the answer of the defendant or party complained of upon oath. An answer is thus required and enforced with a view to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it, and to avoid expense." Greenhough *v.* Gaskell, 1 Mylne & K. 98, 100, shows how extensive is the jurisdiction which courts of equity exercise in this respect. The Lord Chancellor (Lord Brougham) there says: "We are here to consider not the case which has frequently arisen in courts of equity, and more than once since I came into this court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so, has, at different times, been a matter of controversy. And in two cases before Lord Lyndhurst,—Hughs *v.* Biddulph, 4 Russ. 190, and Vent *v.* Pacey, 4 Russ. 193,—and one since I sat here,—Bolton *v.* The Corporation of Liverpool, 1 Mylne & K. 88,—the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no general privilege or protection: he is bound to disclose all he knows and believes and thinks respecting his own case; and the authorities, therefore, are, that he must disclose also the cases he has laid before *counsel for their opinion, unconnected with the suit itself." As to the latter branch of the rule,—the discovery of documents,—the defendant is clearly within the 50th section.(*a*) [*312

COCKBURN, C. J.—As regards the first branch of the application, I am of opinion that there should be no rule. It appears to me that the whole of the information which the defendant professes to seek by the proposed interrogatories, might in all probability have been obtained from the masters of the vessels in which the iron was shipped, and who were the agents of the defendant himself. It does not appear that any steps have been taken to obtain it from those sources, or that, failing these, any application has been made to the plaintiffs to furnish the

(*a*) Which enacts that "upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds), to the production of such as are in his or their possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just."

defendant with the names of their agents abroad. As to the second branch, however, it seems reasonable that the rule should go; but, in order that there may be no unnecessary delay, I think cause should be shown at Chambers.

*313] *CROWDER, J.—The defendant evidently had agents at the ports of discharge, viz. the masters of the vessels. I think no sufficient ground is shown for the first part of the motion, the object of which seems rather to obtain a knowledge of the plaintiff's evidence than anything else. That cannot be allowed. As to that part of the rule, however, which is founded upon the 50th section of the statute, I think the rule should go.

CRESSWELL, J.—I am of the same opinion. The rule must be drawn up to show cause to-morrow, and then it may be enlarged for cause to be shown at Chambers. Rule accordingly.(a)

(a) The rule afterwards came on before Willes, J., and was discharged.

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*314] *In the Matter of the Acknowledgment of JULIA, the Wife of SAMUEL BRADFORD VAUGHAN. *Nov.* 20.

The affidavit verifying the certificate of acknowledgment of a deed by a married woman before special commissioners under the 3 & 4 W. 4, c. 74, ought to show clearly that the persons who purported to have taken the acknowledgment were the commissioners named in the commission.

The court allowed a defect in that respect to be supplied by affidavit.

A SPECIAL commission was directed to Arthur Seddon, Frederick George Moule, and Hiller Goodman, all of Melbourne, in the colony of Australia, or any two of them, to take the acknowledgment of Julia the wife of Samuel Bradford Vaughan, pursuant to the statute 3 & 4 W. 4, c. 74. The acknowledgment was taken, and the certificate signed by Seddon and Moule; and Moule made the usual affidavit of verification, stating that the acknowledgment was made by Mrs. Vaughan, and the certificate signed by Seddon and himself (omitting to state their residences, as required by the rule of Hilary term 1834), the commissioners in the *certificate* mentioned, *at Melbourne*.

An objection having been taken, that there was nothing in the affidavit to identify the persons signing the certificate with the persons named as commissioners,

Phipson, on a former day in this term, moved for a rule or order directing the proper officer under the statute to receive and file the commission, the certificate of the taking of the acknowledgment, the affidavit of verification, and notarial certificate. He referred to In re Alice Shaw, 3 M. & G. 236 (E. C. L. R. vol. 42), 3 Scott, 647, and In re Partridge, 17 C. B. 18 (E. C. L. R. vol. 84).

THE COURT doubted whether there was sufficient in the affidavit veri-

fying the certificate, to show that the persons who purported to have taken the *acknowledgment were two of the commissioners named in the commission, and required an affidavit to identify them. [*315

Phipson now produced an affidavit of one Charles Henry Seddon, of New Bond Street, in the county of Middlesex, which stated that the deponent had known Arthur Seddon, of Melbourne (who was the deponent's cousin), for the space of twenty years, and was well acquainted with his manner and character of handwriting, having frequently seen him write and sign his name; that he (deponent) had looked at the parchment writing or certificate marked "B.," thereunto annexed, and purporting to be signed at the foot or end thereof by one Frederick George Moule and the said Arthur Seddon respectively; and that he believed and had no doubt that the name "Arthur Seddon" so set and subscribed to the aforesaid parchment writing or certificate marked "B.," was of the proper handwriting of the said Arthur Seddon.

He also produced an affidavit verifying the signature of Moule to the certificate and affidavit of verification.

PER CURIAM.—We think that the documents may be received and filed, but with the affidavits now produced and annexed thereto.

Fiat.

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*WALLIS and Another *v.* HIRSCH and Others. *Nov.* 25. [*316

By a contract for the sale of a cargo of linseed cake (paid for on receipt of the shipping documents), it was provided that "any dispute as to quality, or as regards any question arising out of the contract, should be settled by arbitration in the usual manner, and that the contract should not be void on that account."

An action having been brought by the buyers to recover back the money paid, on the ground that the cargo was not of the description represented, but a mere spurious imitation of linseed cake,—*Quære*, whether the case was one in which the court had power to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854 (17 & 28 Vict. c. 125), with a view to compel a reference? But,

Held, that, there being a bonâ fide suggestion of fraud, the case was not one in which they would in the exercise of their discretion enforce the reference.

ON the 18th of July last, the plaintiffs contracted with the defendants for the purchase of a quantity of linseed cake. The bought-note was as follows:—

"London, 18th July, 1856.

"Bought this day, for Messrs. H. & A. Wallis, of Messrs. Hirsch, Strother & Co., a cargo consisting of about eighty to one hundred tons thin oblong Belgian linseed cakes, as per sample sealed and in brokers' possession, at 10*l.* per ton, including cost, freight, and insurance to any safe port on the east coast, at buyers' option. To be shipped from Brussels between the 1st of October and 15th of November next, and paid for on handing shipping documents, by cash, less two months' interest. All short weight on delivery beyond 1 per cent. to be made good

by sellers. Any dispute as to quality, or as regards any question arising out of this contract, to be settled by arbitration in the usual manner: this contract not to be void on that account.

"EDWARDS & EASTLEY, Brokers."

In October last, the plaintiffs paid to the defendants 1077*l.* 6*s.* 9*d.* in exchange for the shipping documents of a cargo of linseed cakes, which the defendants represented to consist of cakes of the quality described in the above contract. Finding them, however, to be of a very inferior description, the plaintiffs declined to receive the linseed cakes, and brought an action to recover back the money they had paid.

*317] *The defendants took out a summons calling upon the plaintiffs to show cause why the proceedings should not be stayed, under the 11th section (*a*) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), on the ground that the parties had, after the passing of the act, by contract in writing, agreed to refer the difference between them to arbitration, and no sufficient reason existed why such matter should not be so referred. This summons was heard before Willes, J., and the learned judge referred the parties to the court.

Bovill, Q. C., now moved for a rule to the same effect.—He sub-

*318] mitted that this was a case precisely within the *contemplation of the statute, and that the jurisdiction of the court was not to be ousted by a mere suggestion of fraud. He referred to Russell *v.* Pellegrini, 28 Law Times, 121, where a charter-party contained a clause, that, if any difference of opinion should arise between the parties, either in principle or detail, the same should be referred to arbitration; and, an action having been brought upon that charter-party by the ship-owner for the agreed freight, and a cross-action by the charterer for damages alleged to have been occasioned by the unseaworthiness of the vessel, the court made absolute a rule for a stay of the proceedings, under this section. Lord Campbell there said: "This is in my opinion a most salutary enactment.(*b*) At one time the courts had great horror of arbitration; and it was even doubted whether such a clause as this

(*a*) Which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require.

(*b*) It is understood to have been his lordship's own creation.

in an agreement was not altogether illegal. When there is a cause of action the courts cannot be ousted of their jurisdiction: but I cannot see any reason why parties should not be allowed to settle their disputes in the manner which they consider most convenient, and why they may not agree that there shall be no cause of action until an arbitration has taken place. It is now settled by Avery *v.* Scott, 8 Exch. 487,† that they may do so; and this enactment has for its object to give the parties the full benefit which they might expect from such an agreement to refer." And Coleridge, J., says: "In the present case, there was an agreement to refer all differences of opinion, either in principle or detail. Who can doubt that a dispute as to a claim for freight on the one hand, or as to a claim for damages on account of the unseaworthiness of the vessel on the other, would be within the meaning of the clause?" [COCKBURN, C. J.—It certainly strikes me, that, where the parties have agreed, that, in case of any difference arising, *it shall be referred, he who objects to the reference taking place, should show good grounds for the objection,—something to make the reference inequitable or inconvenient.] [*319

Honyman showed cause in the first instance, upon an affirmation by one of the plaintiffs, which stated that, sometime after the contract was entered into, the plaintiffs were applied to by Edwards & Eastley, the brokers who made the contract, and requested to accept other and inferior linseed cakes under the contract, at a proportionate reduction in price; that they refused to consent, and said that inferior linseed cakes would be wholly useless to them, inferior cakes not being saleable in the district in which they carried on their business; that, in October last, the defendants offered to deliver to the plaintiffs shipping documents of a cargo which the defendants represented to consist of linseed cakes of the quality described in the contract; that, relying upon such representation of the defendants, the plaintiffs paid them 1077*l.* 6*s.* 9*d.*, being the amount of the invoice delivered by the defendants in respect of the goods comprised in the said shipping documents; that, upon the ship's arrival, the plaintiffs discovered that the greater portion of the cargo consisted of very inferior goods, not linseed cakes at all, but a spurious imitation thereof; that, under these circumstances, the plaintiffs brought an action to recover back the money so paid by them in exchange for the shipping documents, offering to return the goods; and that they (the plaintiffs) believed that, at the time the defendants so invoiced the goods to them, and represented them to be in accordance with the contract, *they knew that the same were an inferior article, and were in fact the very goods which the plaintiffs had refused to receive.*

*This is not a case in which the court has the power under the 11th section of the act to coerce the plaintiffs into a reference: and if it were a case in which the court had a discretion, they would [*320

not under the circumstances exercise it in the defendant's favour. This is not a mere dispute as to the quality of the article contracted for: nor is it a dispute regarding any question arising out of the contract. The clause in question was introduced for the purpose of obviating the difficulty which occurred in Wieler *v.* Shilizzi, 17 C. B. 619 (E. C. L. R. vol. 84). Here, the plaintiffs are suing in respect of something altogether apart from the contract. They complain of fraud: they say, not only that the article tendered to them does not satisfy the contract, but is a spurious imitation of the thing contracted for; but also that it is the very article which had already been offered to them at a reduced price, and rejected by them. [CROWDER, J.—Are we to take it upon your affidavit that there is such gross fraud here that the subject-matter of the action is not within the contract at all?] Even if it be a matter arising out of the contract, this is not a case for the exercise of the discretion given by the 11th section. It is, in truth, not a matter which the parties have agreed to refer. [CROWDER, J.—It would be an easy mode to get rid of a contract to refer, to say that you intend to impute fraud.] Fraud is hardly a matter which the court would feel disposed to refer to two brokers, each of whom, it is well known, assumes that he is the agent of the party naming him. It is evidently much more convenient that such a question should be submitted to a jury.

Bovill, Q. C., in support of the motion.—Any dispute as to the quality of the linseed cake clearly was a matter which was intended to be the subject of a reference. The only ground upon which the plaintiffs seek to evade *this part of their contract, is, that the quality of the article was bad, and that the defendants knew it. Surely that is no sufficient reason why the case should be taken out of this most useful enactment.

*321]

COCKBURN, C. J.—I think we should be extremely reluctant to interfere to prevent the full benefit of the enactment in question, where the parties have in writing agreed expressly that the differences between them shall be submitted to arbitration. But, at the same time, as the act of parliament has given us a discretion to enforce the reference or not as we may deem it expedient, it is incumbent on us to look at all the circumstances, in order to see whether or not the party objecting to the reference has made out a case to warrant us in limiting the operation of the agreement to refer. In this case I think the objection is well founded. It cannot be supposed that the parties contemplated to refer a case of fraud. The plaintiffs never could have imagined that the defendants would have attempted to palm off upon them something altogether foreign to the contract. The affidavits suggest that the plaintiffs bonâ fide believe that a gross fraud has been attempted to be practised upon them. The question is not one of mere difference of quality; but whether the thing delivered is not a spurious article, and one which had already

been tendered, and rejected. I must say I do not think that is at all a fit question for a reference to two brokers. It ought to be submitted to a jury. I therefore think this is a case in which we may very safely, in the exercise of the discretion given us by the act, refuse the rule.

WILLIAMS, J.—I am of the same opinion. The plaintiffs have by their affirmation pledged themselves that this action is founded on fraud. I doubt whether *the terms of this contract, large as they are, were ever intended to meet such a case as that. And, if it be a [*322 matter for the exercise of our discretion, I am clearly of opinion that the tribunal proposed is not the proper one to entertain it.

CROWDER, J.—It is unnecessary to decide whether or not the 11th section of the Common Law Procedure Act, 1854, contemplated such a case as this. I agree with my Lord and my Brother Williams, that, in the exercise of our discretion under that section, we may properly decline to grant this application. The affidavit, which is bonâ fide made, shows that the question to be tried is entirely one of fraud, and therefore that a jury will be the fittest tribunal to which to submit it.

WILLES, J.—I am of the same opinion. It may possibly turn out at the trial that a question may arise which would have been better disposed of by arbitrators. But there is some ground for saying that a question is likely to arise which a jury would be more competent to deal with. Brokers would naturally shrink from a charge of fraud made against a person in the market. The rule must be refused; but, as the case comes here by a sort of arrangement that the summons before me should be treated as a rule nisi, the costs of the application should be costs in the cause. Rule refused.

*In the Matter of the Acknowledgment of SARAH, the Wife of WILLIAM CHANDLER. *Nov.* 25. [*323

The court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed by the proper officer pursuant to the 3 & 4 W. 4, c. 74, s. 85, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn.

A SPECIAL commission was directed to Washington H. Huling, P. T. Clarke, and Don A. Pease, to take the acknowledgment of Sarah, the wife of William Chandler, at Sylvania Township, Lucas County, Ohio. The acknowledgment was taken before the three commissioners, and all of them signed the certificate. The affidavit verifying the certificate was made by Washington H. Huling, who stated that "to the best of his knowledge and belief *the said P. T. Clarke and Don A. Pease are not in any manner interested* in the transaction giving occasion for such acknowledgment," &c. The jurat was as follows:—"Sworn and subscribed before me and in my presence, this 4th day of October, in the

year of our Lord 1856. (Signed) P. T. Clarke, justice of the peace of Sylvania Township, Lucas County, Ohio."

The notarial certificate stated that the affidavit was sworn on the 4th of October, 1856, at Sylvania, Lucas County, Ohio, and that P. T. Clarke was a justice of the peace, and duly qualified to administer oaths.

The case had been twice before Cresswell, J., at Chambers, upon an application that the officer under the 3 and 4 W. 4, c. 74, might be directed to receive and file the documents: but the learned judge declined to make an order.

Atkinson, Serjt., now moved for the direction of the court.—The objections taken were two,—first, that the affidavit of verification merely stated that "Clarke and Pease were not interested in the transaction," *324] which meant that they were not *jointly* interested, and would *be perfectly true if *each* of them was *separately* interested,—secondly, that the affidavit was defective, inasmuch as the jurat did not show *where it was sworn*. The first objection clearly is not one to which the court would be disposed to yield. And, as to the second, the place of residence of the functionary before whom the affidavit is sworn, is given; and, at all events, all difficulty is removed by the notarial certificate, which would be filed by the affidavit, and which states when, where, and before whom the affidavit was made.

PER CURIAM.—We think there is not sufficient weight in either of the objections, to justify us in refusing to permit the documents to be filed. Fiat.(a)

(a) See In re Ollerton, 15 C. B. 796 (R. C. L. R. vol. 80).

END OF MICHAELMAS TERM.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

AT THE

SITTINGS IN BANCO

AFTER

Michaelmas Term,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1856.

The Judges present were:

CRESSWELL, J., WILLIAMS, J., and CROWDER, J.

MINOR *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. *Dec.* 2.

A railway company does not "carry on business" (within the meaning of the 9 & 10 Vict. c. 95, s. 128), at a receiving-house or booking-office kept by an agent for the receipt and booking of parcels and packages for all the railways generally.

THIS was an action charging the defendants as common carriers of goods for hire from London to Bradford, for the loss of a box of artificial flowers belonging to the plaintiff, which had been delivered to and received by the defendants for the purpose of being carried by them from London to Bradford.

At the trial before Jervis, C. J., at the sittings in Middlesex after last Trinity Term, the jury returned a verdict for the plaintiff with 5*l.* damages, the defendants delivering up to the plaintiff the box of flowers in court, which was proved to be of the value of 8*l.* 14*s.*

Upon an affidavit stating, that the goods the *subject-matter of this action were booked to and for the defendants and de- [*826

livered to them at the receiving-house of Messrs. Pickford & Co., who then were the agents of the defendants, at their booking office in Union Street, Southwark, and within the district of the Southwark county court of Surrey, and such delivery was the delivery mentioned in the declaration, and proved at the trial; that the defendants neglected to deliver at Bradford, in Yorkshire, which is within the jurisdiction of the Bradford county court of Yorkshire, and that the non-delivery of the said goods at Bradford was the breach laid in the declaration in respect of which the damages were recovered; and that the defendants do not and never did either reside or carry on business within the jurisdiction of either the said Southwark county court or the Bradford county court,

Horn, in Michaelmas term last, obtained a rule calling on the defendants to show cause why the plaintiff should not recover his costs of the action, pursuant to the 15 & 16 Vict. c. 54, s. 4. He submitted that the whole cause of action did not arise within the jurisdiction in which the defendants carried on their business, for that the "cause of action" consists of the contract *and the breach:* Wilde *v.* Sheridan, 21 Law Journ. Q. B. 260.

Bovill, Q. C., and *Giffard*, showed cause, upon an affidavit of a clerk to Messrs. Pickford & Co., stating, that, at the time the cause of action arose, he was in the employ of Pickford & Co., at their office in Union Street, Southwark; that Pickford & Co. acted as the agents for the defendants in respect of goods conveyed by their luggage-trains, *and that public notice of that fact appeared in the office in Union Street;* that the company carried on their business as carriers at the said office in Union Street, Southwark, though not the whole of *their business, they having several other places where they also carried on business; that the said office in Union Street was one of the receiving-houses of the company as carriers, where they received goods to be carried by their luggage-trains; that, whilst the deponent was acting as such clerk in Union Street, he was in the daily habit of receiving goods for the defendants there to be conveyed on the defendants' lines of railway, and of giving receipts to the senders of the goods for and on behalf of the company, and that many letters, notices, and other papers directed to or intended for the company were during that time left at the said office in Union Street, and received by the deponent and the other clerks there for and on behalf of the company; that the box of goods in question in this action was received and a receipt for the same given by another clerk of Pickford & Co. for and on behalf of the company, and that the box was in due course forwarded from the said office to another place where the defendants also carried on their business as carriers; that the said Union Street office of the said Pickford & Co., and where the defendants carried on their business, was within the district and jurisdiction of the Southwark county court of Surrey; and that the contract which formed the subject of the action for the

*327]

carriage of the said box to Bradford, was made at the said office in Union Street upon the occasion of its being received there by the said clerk as aforesaid.

The only question is, whether the defendants carried on their business in Union Street, Southwark: 9 & 10 Vict. c. 95, s. 60. Now, they can only carry on business by means of agents; and it is sworn that the office in Union Street is one of the places where their business is carried on through the agency of Pickford & Co.: and the plaintiff recovered upon the footing that the delivery of the box at that place was a delivery to the company. [COCKBURN, C. J.—Is the office in Union Street the office *of the company? And are the people employed there [*328 the servants of the company?] No doubt, the office is one where Pickford & Co. receive goods for all the railway companies; it is not a place where goods are received exclusively for the defendants' railway; nor are the persons employed there the servants, in the ordinary sense, of the company. But it is a place where the business of the company is carried on by Pickford & Co. as their agents: and the notice required by the carriers' act, 11 G. 4 & 1 W. 4, c. 68, is stuck up there. A corporation "dwells" at the place where its business is carried on: Taylor *v.* The Crowland Gas and Coke Company, 10 Exch. 288, n.;† 24 Law J. Exch. 233. [CROWDER, J.—That does not advance your argument much. Where does this company carry on its business?] At Euston Square, in Union Street, Southwark, and at every other place where goods are received for them by their agents. [WILLIAMS, J.—Would service of a summons or an order upon the company at the place in question be good service?] It is submitted that it would; service at "the place of business" being by the rules sufficient.(*a*) [COCKBURN, C. J.—*Could a manufacturer at Manchester be said to carry on [*329 business at the warehouse of his agent in London?] He might. In Stephens *v.* Derry, 16 East, 147, where a question arose under the London court of requests act 39 & 40 G. 3, c. civ., as to whether a husband domiciled in Middlesex, where his wife carried on business, though he was employed as a clerk in the office of solicitors in London, was privileged to be sued only in London for a debt under 5*l.*, as a person "seeking his livelihood" there,—Le Blanc, J., said: "This person may fairly be said to seek his livelihood where he resides with

(*a*) By s. 45 of the rules framed pursuant to the 19 & 20 Vict. c. 108, s. 32, it is provided that "the service of the summons, except in the cases hereinafter specially provided for, shall be either personal, or by delivering the same to some person, apparently sixteen years old, at the house or place of dwelling or *place of business* of the defendant; but no place of business shall be deemed the place of business of the defendant, *unless he shall be the master or one of the masters thereof.*" And s. 51 provides that "service of the summons may be effected on a *railway company* or other corporation by delivering the summons to a secretary, station-master, or clerk of the defendant, at any *station* or *office* of the defendants within the district of the court in which the summons is to be served." The order, being the judgment of the court, it seems, need not be served at all: Ely *v.* Moule, 5 Exch. 918,† 20 Law J. Exch. 29; Robinson *v.* Gell, 12 C. B. 191 (E. C. L. R. vol. 74), 21 Law J., C. P., 155.

his wife in Middlesex; for, *the trade carried on by her agency is his trade.*" Who is liable in respect of contracts made at this place,—Pickford & Co., or the company? The persons dealt with clearly are, the company, and not Pickford & Co. [COCKBURN, C. J.—Is there anything at the office to indicate to persons coming there that they are directly dealing with the company? Are Messrs. Pickford & Co. authorized to make contracts for the company?] It appears from the affidavit of Pickford & Co.'s clerk, that receipts are given there in the name of the company. [COCKBURN, C. J.—That would be so if Pickford & Co. were authorized as agents of the company. Are Pickford & Co. in fact put forward as the persons contracting, though as agents for the company?] It would seem that they are. In Mitchell *v.* Hender, 23 Law J., Q. B., 273, the defendant was a surgeon, apothecary, and accoucheur, residing at Callington, in the district of the county court of Liskeard. He daily attended persons seeking his advice, residing in the district of the Launceston county court: and it was held, that he "carried on his business" within the jurisdiction of the Launceston county court, within the meaning of the 9 & 10 Vict. c. 95, s. 128.

*330] *Horn*, in support of his rule.—This is clearly a case *of concurrent jurisdiction. Every reasonable intendment will be made to prevent the exclusion of the plaintiff from the right of suing in the superior court. It is not every agency that constitutes a carrying on of business. "Residence" or "dwelling," and "carrying on business," in this act, are almost identical. Mitchell *v.* Hender, 23 Law J., Q. B., 273, is rather an authority in favour of the plaintiff. The defendant there was also a partner in a mine worked on the cost-book principle in the district of the Launceston county court: he never attended to the mine personally, but the business was conducted by an agent: and the court inclined to think that he did not carry on the business of a miner within the jurisdiction of the Launceston county court, within the meaning of the statute. "I do not think," says Coleridge, J., "that it would be enough for a man who never came near the place, to carry on business by an agent. Dwelling must be a personal act; and so, I think, must the carrying on business be." Here, no personal act was ever done by the defendants at the office in Union Street. [COCKBURN, C. J.—As applied to a corporation, what is a personal act?] An act done by their secretary or clerk or other servant. This place, in truth, is a mere receiving or booking-office, where Pickford & Co. receive goods on behalf of *all* the railways. In Shiels *v.* Rait, 7 C. B. 116 (E. C. L. R. vol. 62), 18 Law J., C. P., 120, it was held, that one who resides in Scotland, and carries on business in London by means of an agent, is not bound to sue in the city small debts court established under the 10 & 11 Vict. c. lxxi., for a debt not exceeding 20*l.* Residence and carrying on business, for the purpose of this act, are synony-

mous. Could it be said that an attorney at Exeter carries on business in London, because a portion of his business is conducted by his London agent? These people have agents in every town through or near which their railway passes: where *are they to be sued? They pay no rent for the office in Union Street. In no sense, therefore, [*331 can it be said to be their place of business. They carry on their business in London at the terminus in Euston Square.

COCKBURN, C. J.—The point involved in this case is one of some nicety, therefore we will take a little time to consider it and to look into the affidavits. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

This was a rule calling upon the defendants, the London and North Western Railway Company, to show cause why the plaintiff should not have his costs of suit, under the County Court Act of 15 & 16 Vict. c. 54, s. 4. The rule came on to be argued on the last day of Michaelmas Term, before Cockburn, C. J., my Brothers Crowder and Willes, and myself.

Having considered the case, the court is of opinion that the defendants did not carry on business in the borough of Southwark, at the office of Messrs. Pickford & Co., within the meaning of the act of parliament in question: for, that the only business carried on at that office was that which Pickford & Co. themselves carried on there, viz. the business of railway agency to the defendants and several other companies.

The rule must, therefore, be made absolute. Rule absolute.

COWDELL *v.* NEALE. *Dec.* 2. [*332

The mere fact that an action is pending upon an attorney's bill does not give a common law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances.

Whether charges for attendances, &c., in attempting to procure bail for a person who has been committed by a single magistrate for a breach of the peace, constitute charges for business done in a court of law, so as to enable a judge to refer the bill for taxation,—*quære?*

THIS was an action upon an attorney's bill for business done for the defendant in the months of January, February, and March, 1853. The bill was duly delivered in May, 1853, amounting to 25*l.*, and the action was commenced on the 29th of September last. Notice of trial was given, and the cause set down for the second sitting in the last term. On the 13th of November, the defendant took out a summons to tax the bill, which summons came on to be heard before Willes, J., on the following day, when, notwithstanding it was objected on the part of the plaintiff that the bill was not taxable, inasmuch as it had been delivered more than twelve months, and there were no special circumstances shown, so as to bring the case within the exception in the 37th section of the 6 & 7 Vict. c. 73, and that there was no item in the bill for any business

done in any court of law, and therefore no jurisdiction, the learned judge made the order, conceiving that the fact of the pendency of an action upon the bill gave him jurisdiction.

The bill was a bill of charges in respect of business done by the plaintiff for the defendant, in attempting to procure bail for him, he having been committed by a magistrate to Leicester gaol on a charge of having committed a breach of the peace. The bill contained, amongst others, the following items:—

1853.	£	s.	d.
Jan 24. Attending your messenger at H., on his informing me of your commitment, and your requesting me to see you at Leicester Gaol to-morrow	0	6	8
*333] *Jan. 29. Drawing notice of bail to magistrate, and the Rev. Thomas Neale the complainant . .	0	5	0
Three fair copies for service	0	4	6
Long attendance on you in gaol, procuring your signature to notices, and conferring as to bail, and the indemnity to be given, when you wished me to go to Armitage, and see Mr T. B., your trustee, thereon	0	13	4
Feb. 1. Journey to Armitage, and thence to B., to see Mr. B. as requested, and attending him in conference as to the amount of mortgages and encumbrances on your reversionary property, and the notices he had received thereof . .	2	2	0
Paid travelling expenses, railway fare, chaise hire, 82 miles and back	1	12	6
2. Journey to Leicester, to attend before magistrate with bail for you	2	2	0
Paid J. V. and T. P., proposed sureties, for loss of time, going to Leicester and back, when bail was opposed and refused	0	15	0
Paid travelling expenses of self and proposed sureties to and at Leicester and back, 14 miles (no railway or coach) .	1	7	6
21. Letter to T. F. and G. C. S., wishing to know if they would serve you in becoming your sureties . . .	0	7	0

Holl, in Michaelmas Term, obtained a rule nisi to rescind that order, on the grounds already urged at Chambers. He referred to Bush *v.* Sayer, 8 Scott, N. R. 756, 7 M. & G. 1027, 2 D. & L. 602, where it was held that the statute 6 & 7 Vict. c. 73, s. 37, gives no jurisdiction *334] to a judge of *a court of law* to refer to taxation a bill *for business no part of which has been transacted in any court of law or equity, although an action may be pending therein.(a)

Hayes, Serjt., on a subsequent day showed cause.—Under the 6 & 7 Vict. c. 73, s. 37, *all* charges in an attorney's or solicitor's bill are taxable:

(a) As to "special circumstances," see Wells, In re, 8 Beav. 416, 14 Law J., Ch., 215, Bennett, In re, 8 Beav. 567, 14 Law J., Ch., 403, Fyson, In re, 9 Beav. 117, Harrison, In re, 10 Beav. 57, 16 Law J., Ch., 170, Williams, In re, 15 Beav. 417, and Barnard, In re, 2 De G. M'N. & G. 359.

it is only a question of jurisdiction. [WILLES, J.—I thought Dagley *v.* Kentish, 2 B. & Ad. 411 (E. C. L. R. vol. 22), 1 Dowl. P. C. 330, had been overruled. I find, however, that that is not so. In order to found the jurisdiction, two things must concur,—that an action should be brought by the attorney for his bill, and that the bill should contain taxable items: Williams *v.* Griffith, 6 M. & W. 32;† Williams, Executor of Williams, *v.* Griffith, 10 M. & W. 125,† 2 Dowl. N. S. 281.] Under the old statute of 2 Geo. 2, c. 23, s. 23, the court in which the principal part of the business was done, was that which had jurisdiction to tax the bill. But now, wherever there are taxable items, the court in which an action is pending on the bill may refer it for taxation, because the court will not enter upon a discussion as to the reasonableness of the charges. [CRESSWELL, J.—I should doubt whether a court of law could refer a bill for taxation merely because an action is brought upon it therein, if it contains items that are taxable in a court of equity.] It is submitted that the mere circumstance of the bill being taxable anywhere gives the jurisdiction. This rule was obtained upon the authority of Bush *v.* Sayer. [CRESSWELL, J.—Does this bill contain taxable items?] It does: the charges in respect of attendances to procure bail to be taken by the magistrate are clearly taxable, *within the 6 & 7 Vict. c. 73, s. 37. The right of an attorney [*335 to appear and act for an accused before magistrates was much discussed in Collier *v.* Hicks, 2 B. & Ad. 663 (E. C. L. R. vol. 22), where Lord Tenterden says,—"This was undoubtedly an open court, and the public had a right to be present, as in other courts." If this was a "court," was it a court of law or a court of equity? [CRESSWELL, J.—It was also considered in Cox *v.* Coleridge, 1 B. & C. 37 (E. C. L. R. vol. 8), 2 D. & R. 86 (E. C. L. R. vol. 16), and Garnett *v.* Ferrand, 6 B. & C. 611 (E. C. L. R. vol. 13), 9 D. & R. 657 (E. C. L. R. vol. 22). WILLIAMS, J.—At what stage did the interference of the attorney take place?] After the defendant had been committed for want of bail. Still, however, it was a proceeding *in court*. In Watt *v.* Collins, R. & M. 284 (E. C. L. R. vol. 21), "attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify," and "attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein," were held to be taxable items in an attorney's bill, within the 2 G. 2, c. 23, s. 23: and Best, C. J., said, "It is necessary to be assured of business having been done in a cause, or that proceedings in court have existed, in the conduct of which the defendant has received assistance from the plaintiff as an attorney; it is enough that this may be fairly collected from the nature of the charge itself. The inclination of the court, if any, ought to be, to bring an attorney's bill within the range of a statute so useful to the subject." In Dagley *v.* Kentish, the bill contained no taxable items within the 2 G. 2, c. 23, s. 23; the charges were not for

business done in any court. In Smith *v.* Taylor, 7 Bingh. 259 (E. C. L. R. vol. 20), 5 M. & P. 66, 1 Dowl. P. C. 212, the following were held to be taxable items,—"You having been served with a writ, after paying the amount of debt, attending you, conferring and advising thereon," and "Attending you, advising you on the action that had been brought against you at the suit of M., and advising." Tindal, C. J., there says: "The question is, whether, when the defendant is *336] *sued and consults with an attorney on the subject of the suit, and a fee is charged for the advice given, that is not a fee for business in a court of law. In one case,(*a*) the charge for consulting about bail and endeavouring to procure bail, was held a charge within the statute, although the bail were unable to justify. In another case,(*b*) the preparing and swearing an affidavit to hold to bail has been holden within the act, though such affidavit is made before any process issues, and is not intituled in the cause. There are many other cases which have not now been mentioned, governed by the same principle. In Sandon *v.* Bourne, 4 Campb. 68,(*c*) the charge was for preparing a warrant of attorney, which, until it was filed, was not an act in court. And in another case,(*d*) a charge for preparing a warrant was held a taxable item, although the warrant was never executed. It seems, therefore, that the defendant has a right to question the amount of this fee before an officer of the court, and the officer would have had power to reduce it if too high. Although the charge may be on the verge of the rule, yet, as the act is remedial, and for the benefit of suitors, I think the charge is within its operation." The 37th section of the 6 & 7 Vict. c. 73, evidently intended to exhaust every description of court, and then to provide for the only case that was left, viz. the case of business not transacted in any court at all.

Hall, in support of his rule.—The learned judge clearly had no jurisdiction to make this order, the bill containing no charges for business done in any court within the meaning of the statute, and Bush *337] *v.* Sayer, 8 *Scott, N. R. 756, 7 M. & G. 1027 (E. C. L. R. vol. 49), 2 D. & L. 602, and Slater *v.* Brookes, 9 Dowl. P. C. 349, showing that the mere fact of an action having been brought upon the bill in this court makes no difference. [CRESSWELL, J.—As to this point we are all agreed: the question is, whether this was business done in a *court*, and whether there are special circumstances.] There was no proceeding here before any court. A court of petty session might possibly for this purpose be considered a court: but here the proceedings took place before a single magistrate, before whom the defendant had been charged with having used abusive language to his

(*a*) Watt *v.* Collins, R. & M. 284 (E. C. L. R. vol. 21).

(*b*) Winter *v.* Payne, 6 T. R. 645.

(*c*) And see James *v.* Child, 2 C. & J. 678,† 2 Tyrwh. 732, and Wilson *v.* Gutteridge, 3 B. & C. 157 (E. C. L. R. vol. 10), 4 D. & R. 736 (E. C. L. R. vol. 16).

(*d*) Weld *v.* Crawford, 2 Stark. N. P. C. 538 (E. C. L. R. vol. 3). See also Painter *v.* Linsell, 8 Scott, 453, 8 Dowl. P. C. 250.

father; and the attorney does not appear to have attended any court at all; for, he was first employed to procure bail after the defendant had been committed to prison. [CRESSWELL, J.—Was the magistrate asked to punish the prisoner summarily, or to hold him to bail in order to secure the father against a repetition of the outrage?] The latter. The procuring a bail-bond in a civil action is a proceeding *in a cause.* So of advice given in a pending action. The 6 & 7 Vict. c. 73, s. 37, amounts to a prohibition to the judge to order the bill to be taxed, without special circumstances, after the expiration of twelve months. In the case of In re Whicher, 13 M. & W. 549,† 2 D. & L. 407, it was held, that, in order to ground an application to tax an attorney's bill, after verdict, under the 6 & 7 Vict. c. 73, s. 37, the "special circumstances" must have relation to some matter newly come to the knowledge of the party, and that it is not sufficient to show circumstances known to the defendant before the action. [WILLES, J., to *Hayes.*—What special circumstances do you allege here?] The affidavit of the defendant states "that the bill contains several objectionable and unreasonable items, and that the defendant did not proceed to a taxation of the bill at an earlier stage, in consequence of his entertaining a hope that the plaintiff would make a deduction of the said *items; that charges are made in the bill for procuring bail as therein [*338 mentioned, when in truth and in fact the bail tendered by the plaintiff on behalf of the defendant, was insufficient, and the plaintiff must have known that such bail would have been refused; and that the bill contained charges for letters and attendances not authorized by the defendant." [CRESSWELL, J.—There is nothing "special" in any of these circumstances.] The real question is, whether the statute has taken away the common law jurisdiction of the courts.

CRESSWELL, J.—This case involves two points which are of very considerable and general importance,—the first being, whether a single magistrate acting in a matter such as that disclosed upon the affidavits can be considered as acting as a court, so as to make charges for business transacted before him taxable in a court of law; as to which some dicta may be found in some of the cases to aid us in the conclusion at which we ought to arrive,—and the other being a question affecting the practice of Westminster Hall. We will therefore take time to consider, and, if possible, consult some of the other judges, before we pronounce our decision. Cur. adv. vult.

CRESSWELL, J., now said,—My Brother Willes concurs with the rest of the court(*a*) in thinking that this case must be governed by the 6 & 7 Vict. c. 73, s. 37; and that, inasmuch as more than a year has elapsed since the delivery of the bill, it could not be referred for taxation without special circumstances; and that, no special circumstances having been shown, the order directing the taxation of the bill must be discharged. Rule absolute.

(*a*) The case was argued before Cresswell, J., Williams, J., Crowder, J., and Willes, J.

*339] *PARRY v. JONES. *Dec.* 2.

An interim order for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, operates only to protect the person of the petitioner and such of his property as by those acts vests in his assignees.

Such order, therefore, does not prevent a creditor from issuing a sequestrari facias to seize the profits of a benefice after the insolvent's petition and before the final order.

WELSBY, in Michaelmas Term last, on behalf of the defendant, obtained a rule calling upon the plaintiff to show cause why the writ of sequestration issued by him in this cause should not be set aside, and why he should not pay to the defendant or his attorney the costs of and occasioned thereby, together with the costs of the application,—upon the ground that, having obtained an interim order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, his person and property were protected from process.

J. Brown, on a subsequent day, showed cause.—It appears that the writ of summons in this case issued on the 18th of September last. The defendant filed his petition and obtained an interim order for protection from process on the 25th of September, notice of which was sent to the plaintiff by post on the 30th, and received by him on the 1st of October. On the 6th of October, the writ of summons was served on the defendant; and on the 22d the writ of sequestrari facias was sent to the consistory court of Bangor, to sequester the living of the defendant, who was vicar of Llanidare, in the county of Anglesey. The question is whether the profits of the defendant's benefice passed to his assignees on the filing of his petition. Now, the 1st section of the 5 & 6 Vict. c. 116 enacts, that the court or commissioner shall give, upon the filing of the petition, "a protection to the petitioner from all process whatever either against his person or his property of every description," &c., and that, "upon the presentation of the petition, all the estate and effects of the petitioner shall forthwith become
*340] vested in the official *assignee who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." It was distinctly decided in Arbuckle *v.* Cowtan, 3 Bos. & Pull. 321, that the profits of an ecclesiastical benefice did not pass to the assignees under the insolvent act of 37 G. 3, c. 112, s. 12, though included in the schedule of the insolvent. Lord Alvanley, in giving judgment in that case,—after referring to the common law mode of obtaining the fruits of a judgment against ecclesiastical property,—says: "That a private creditor should be able to avail himself of a writ of sequestration for

the purpose of satisfying his debt out of the benefice of a clergyman, and yet, that, where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly I will not pretend to say. Lord Hardwicke, in the case of Ex parte Meymott, 1 Atk. 196, abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems, however, to think, that, in a writ to the bishop, the assignees might have the same remedy as any other creditor. But he never hints at an idea that they could take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. Wilbraham, in arguing for the negative, insisted that his living could not be assigned by the commission; for that the assignees must take all or *none; and [*341 if they took all, nothing would be left to provide for the service of the cure. Lord Hardwicke, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common-law rule with respect to sequestration, says,—'I do not see (but I give no opinion) why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority.' As a long time has elapsed since this opinion was thrown out, during which some clergymen must probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed. But, although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an insolvent act, or that the assignees under such an act will be entitled to demand and receive ecclesiastical dues." In Bishop *v.* Hatch, 1 Ad. & E. 171, 3 N. & M. 498, it was held, that the assignees of an insolvent clergyman do not acquire any right to his benefice, or the income of it, by the assignment, nor until they have obtained a sequestration, as directed by the 7 G. 4, c. 57, s. 28, after adjudication by the insolvent debtors court on such insolvent's petition; that an individual judgment-creditor may sequester the benefice for his own debt, notwithstanding the assignment to the provisional assignee; and that the assignees, after adjudication, are not entitled to set aside the sequestration of such creditor, or to claim precedence over it for a sequestration issued by them pursuant to the act. Littledale, J., there

*342] says,—"The proviso of the 28th section operates merely as an *exception to what is enacted in the 11th,(a) and must be read as if introduced at the end of it. The legislature does not deprive the assignees altogether of this kind of property; but, till the adjudication, they are not in a condition to proceed against it. After adjudication they may, but until then there is nothing to prevent other creditors from suing out execution in the ordinary way." And Patteson, J., says: "The provisions of this act are certainly contradictory; and, when this case was last argued, I thought that a decision such as I am now obliged to come to, would be so much at variance with the whole object of the act, that I wished to see if any clause could be pointed out which would enable us to arrive at a different conclusion. I was much struck with the argument urged on behalf of the assignees, that by the 28th section their hands are tied until the adjudication of the insolvent debtors court, while other creditors have notice, and are at liberty, to proceed against the benefice; and I should have been glad to find any words in the act showing this not to be so. But, on looking into it, no such words are found. The 11th section, to operate favourably to the assignees, should convey to them either a right to take the income, or an absolute property in the benefice. The first it certainly does not, or if it did, the right is cut down by the 28th section. If the whole property passed *343] *by the 11th, the 28th section would be absurd: and both must be taken together. Arbuckle v. Cowtan, 3 Bos. & P. 321, is an express decision that the profits of an ecclesiastical benefice do not pass by assignment under the insolvent debtors act: the words of the clause in the then existing statute (37 G. 3, c. 112, s. 12), upon which that case turned, were nearly similar to those of s. 11 of the present act. I think that case, and the words of the statute, cannot be got over. I see the inconvenience which follows; but that is a matter to be provided for by the legislature." The legislature has not thought fit to interfere in the matter; for, the 55th section of the 1 & 2 Vict. c. 110(b) is a re-enactment of the 28th section of the 7 G. 4, c. 57. It is clear, therefore, that the income of the defendant's benefice had not passed to his

(a) "That all powers vested in any petitioner for protection from process whose estate shall, under the provisions of the said recited act or this act, or either of them, have been vested in an assignee or assignees, which such petitioner might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be hereby vested in such assignee or assignees, to be by such assignee or assignees executed for the benefit of the creditors of such petitioner under this act, in such manner as such petitioner might have executed the same." Re-enacted, 1 & 2 Vict. c.110, s. 49.

(b) Which enacts "that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy, for the purposes of this act: provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner: and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of levari facias founded upon any judgment against such prisoner."

assignees when this writ of sequestrari facias issued. The interim order under the 7 & 8 Vict. c. 96, s. 6, operates a protection of the insolvent from all "process" which might affect property vested in the assignees. The rights of a creditor are not to be taken away without express words.

Welsby, in support of his rule.—By the express *language of the 5 & 6 Vict. c. 116, s. 1, the interim order operates "a protection to the prisoner *from all process whatever*, either against his person or his property of every description." Here, all the proceedings took place after the making of the protecting order. The 5 & 6 Vict. c. 116 is not to be taken in pari materia with the ordinary insolvent acts: its object was, to give temporary protection to persons coming forward and giving up their property for the general benefit of their creditors: this is shown by the preamble,—"Whereas it is expedient to protect from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors." And the plain meaning of the enacting words, is, that, pending the protection, the person and property of the petitioner shall be free from all molestation. This is further carried out by the 5th and 7th sections. [CROWDER, J.—Does the 1st section mean more than that the interim order shall enure as a protection of the person of the petitioner, and of the property which on the final order is by s. 7 to vest in the assignees?] That is the question. [CROWDER, J.—How do you get over the case of Bishop *v.* Hatch?] Whether the property passes to the assignees or not, is immaterial. [WILLIAMS, J.—How are the assignees to provide for the performance of the necessary duties of the benefice?] It is not necessary to insist on the rights of the assignees. All that is contended for on the part of the defendant, is, that pending the proceedings under his petition, there is a stay of all process whatever as against his person and his property. It is not contended that the process is void, but merely that it is stayed. Cur. adv. vult. [*344

WILLIAMS, J., now delivered the judgment of the court:—

*This was a rule obtained by the defendant calling upon the plaintiff to show cause why a writ of sequestrari facias should not be set aside, upon the ground that, as the defendant had obtained an interim order under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the issuing of the sequestrari facias was in violation of the 1st section of the first-mentioned act, which enacts, that, when the interim order is obtained, all process against person or property shall be stayed. [*345

The case was argued on the last day of Michaelmas Term, before Cockburn, C. J., and my brothers Crowder and Willes, and myself: and we are of opinion that the rule should be discharged.

The law is clear, that property consecrated to divine uses shall not be

taken in execution by temporal hands. Thus, the glebe or churchyard cannot be taken under an elegit.(a)

Upon this principle it was held in Arbuckle v. Cowtan, 3 Bos. & Pul. 321, that profits of a benefice did not pass under an assignment pursuant to the then insolvent act.

The same principle was again affirmed in Bishop v. Hatch, 1 Ad. & E. 171 (E. C. L. R. vol. 28), 3 N. & M. 498, where it was considered by Patteson, J., that the assignees of an insolvent under the 7 G. 4, c. 57, even without the introductory words of the 28th section, would have been confined to the peculiar remedy given by that section of the statute (similar to s. 55 of the 1 & 2 Vict. c. 110): see also *346] Waite v. Bishop, 1 C. M. & R. 507,† S. C. 3 Dowl. *P. C. 234, more fully reported, and Hawkins v. Gathercole, 6 De Gex, M'N., & G. 1.(b)

The statutes now under consideration, construed with reference to the above rule of law, contain no provision by which the assignees can obtain the profits of an ecclesiastical benefice: and, as we think it clear that only such property as would pass to, or could be distributed by, the assignees under the act, is protected from process by the interim order, it follows that a writ of sequestrari facias not affecting such property, but being a direction to the bishop to apply the surplus proceeds of the defendant's ecclesiastical benefice, after providing for the cure of souls and other necessary outgoings, towards payment of the plaintiff's debt, has been properly issued, and the rule to set it aside must therefore be discharged with costs. Rule discharged, with costs.

(a) See Gilbert on Executions, p. 40, citing Jenk. Cent. p. 267, where it is said that an "elegit does not lie of the glebe land of a parson or vicar, no more than of a churchyard: est solum Deo consecratum,"—referring to M. 29 Ed. 3, fo. 44, and M. 21 Ed. 4, fo. 45, b.

(b) Where it was held that a registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment-creditor to the appointment of a receiver, under the 1 & 2 Vict. c. 110, s. 18.

*347] *SIMPSON v. SAVAGE. *Dec.* 2.

In an action by a reversioner, for an injury to his reversion, by the erection of workshops and a forge and chimney on land adjoining his houses, in the occupation of his tenants, and causing smoke to issue from the chimney, and making loud noises,—the evidence was, that the chimney was built by the defendant's landlord, and that large quantities of smoke issued from it in consequence of fires lighted by the defendant for the purposes of his trade, and that the plaintiff's tenants gave notice to quit:—

Held, that there was no evidence to go to the jury to prove injury to the reversion; for, that, to entitle the plaintiff to maintain the action, the injury complained of must be of a permanent character, and the only act chargeable to the defendant, the lighting the fires, not being in its nature permanent.

THIS was an action for an injury to the plaintiff's reversion, by the erection of certain workshops and forges on land adjoining the plaintiff's houses, making fires therein, and causing smoke to issue therefrom, &c.

The declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, certain messuages and dwelling-houses, with the appurtenances, of the plaintiff, were respectively in the occupation of certain tenants thereof to the plaintiff, the reversion thereof respectively then and still belonging to the plaintiff: yet that the defendant, whilst the said messuages and dwelling-houses, with the appurtenances, were so in such occupation as aforesaid, wrongfully and unjustly, without the leave or license of the plaintiff and his said tenants, and against their will respectively, built and erected certain workshops, manufactory, and forges, and other permanent works, adjoining and close to the messuages and dwelling-houses aforesaid, for the purpose of working and permanently continuing to work the same in the manner thereinafter mentioned, and then wrongfully and unjustly made and caused to be made and continued therein and thereon divers large and injurious fires against the will of the plaintiff and his said tenants, and made thereon wrongfully and injuriously and continuously loud, heavy, jarring, hammering, battering, and agitating sounds and noises; and by reason of the premises, and of the smoke, blacks, and other gaseous effluvia arising from the said fires and forges entering into and diffusing themselves in, upon, over, *and throughout the said messuages and dwelling-houses, the same had respectively become utterly and [*348 permanently uninhabitable, and the said tenants respectively had been and would be compelled to quit and leave the same respectively, and to cease to be the tenants thereof, and the plaintiff would be unable to let the same, or to turn the same to any beneficial or profitable account, and the same had become and were thereby greatly deteriorated in value, and the present market price thereof was thereby greatly diminished, and the plaintiff had been and was and would be permanently injured, prejudiced, and aggrieved in his reversionary estate and interest in the said messuages and dwelling-houses by reason of the premises: And the plaintiff claimed 500*l.*

Plea, not guilty; whereupon issue was joined.

The cause was tried before Lord Campbell, C. J., at the last assizes for the county of Norfolk. The facts were as follows:—

The plaintiff was the owner of a plot of ground in King's Lynn, in the county of Norfolk, upon which he built several houses in 1850, which were let to tenants at rents varying from 40*l.* to 44*l.* per annum. The defendant is an agricultural implement maker occupying premises consisting of workshops with a forge and chimney and yard closely adjoining the back yards of the plaintiff's houses. The workshops, forge, and chimney were erected (not by the defendant) in 1851, and were a few feet only from the back windows of the plaintiff's houses. The nuisance complained of consisted in the emission of smoke from the forge chimney, to such an extent that great quantities of soot entered the windows in the rear of the plaintiff's houses, dirtying and spoiling

the furniture in the rooms, and of noises from the hammering, and offensive smells from the burning of old wood in the yard. It was
*349] proved, on the part of the plaintiff, that, in consequence of the *nuisance, which was of a serious character, some of the plaintiff's tenants had given him notice to quit (though it did not appear that any of them had actually quitted); and that, in consequence of the nuisance, the plaintiff's houses would not realize as much rent as they would otherwise have done.

On the part of the defendant, it was submitted, on the authority of Mumford *v.* The Oxford, Worcester, and Wolverhampton Railway Company, 1 Hurlst. & N. 34,† and Dobson *v.* Blackmore, 9 Q. B. 991 (E. C. L. R. vol. 58), that, to entitle the plaintiff, as reversioner, to maintain this action, it was incumbent on him to show that the wrong complained of was in its nature permanent; and that there was no evidence here that the nuisances complained of were otherwise than of a mere temporary description.

For the plaintiff,—conceding that, according to the cases cited, the fires in the yard and the noises would not constitute a cause of action, —it was insisted that the smoke from the chimney was a nuisance of a permanent nature, and therefore an injury to the reversion.

His Lordship ruled that the nuisances which were merely of a temporary nature, such as the fires in the yard, and the noises, would not give a right of action: but with reference to the smoke issuing from the foundry chimney, he thought the case distinguishable from Mumford *v.* The Oxford, Worcester, and Wolverhampton Railway Company, and that there was evidence to go to the jury to prove injury to the reversion: but he reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no injury to the reversion.

A verdict having been found for the plaintiff, damages 40*s.*,

O'Malley, Q. C., in Michaelmas Term last, obtained a rule nisi
*350] accordingly, in granting which Cresswell, J., *observed:—The case referred to makes it imperative on the court to grant the rule, though as regards the smoke there may be a difference. In the case of an indictment against a man for a nuisance in permitting smoke to issue from a chimney, it may be a question whether the sheriff, under a writ of prostration, would do all he is bound to do, by going to the premises to put out the fire. It may be that the chimney, which was erected for the purpose, followed by the emission of smoke, would constitute the cause of complaint.

Byles, Serjt., and *Couch*, showed cause.—It may be conceded that a mere temporary trespass, where no actual injury is done, affords no ground of action to the reversioner. That was the case of Baxter *v.* Taylor, 4 B. & Ad. 72 (E. C. L. R. vol. 24), 1 N. & M. 11 (E. C. L. R. vol. 28), where the thing complained of was a mere transient tres-

pass, not necessarily injurious to the plaintiff's reversionary interest, though accompanied by a claim of right, inasmuch as acts of that sort, as Taunton, J., observed, "could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act." Here, however, the complaint is of a nuisance arising from works of a permanent nature. [CRESSWELL, J.—The permanent works were not in themselves a nuisance. It was the lighting the fire that made the chimney obnoxious.] It is of the chimney as used that the plaintiff complains. The merely placing a log of wood across a way, to the obstruction of a tenant, would not give the reversioner a right of action: but building a wall or planting a hedge across it would, because that would be a permanent interference with the right. [CROWDER, J.—Who is to determine what is permanent, and what not?] The jury. In Aldred's Case, 9 Co. Rep. 58, it was held, that an action on the case lies for erecting a hog-stye so *near the house of the plaintiff that the air thereof was corrupted. So of a lime-kiln, if the smoke enters the plaintiff's house, so that [*351 he cannot dwell there: so of a dye-house, &c., if the filth runs into his fish-pond, &c. Wray, C. J., there says: "The building of a lime-kiln is good and profitable; but, if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So, if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calf-skins and sheep-skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in 13 H. 7, fo. 26 b: and this stands with the rule of law and reason, *sc.* Prohibetur ne quis faciat in suo quod nocere possit alieno: et, sic utere tuo ut alienum non lædas." And Coke adds: "Vide in the Book of Entries, tit. *Nuisance*, 406 b, he who has a several piscary in a water shall have an action against him who erects a dye-house, ac fimos fœditates, et alia sordida extra domum præd' decurrentia in piscariam præd' decurrere fecit, per quod idem proficuum piscariæ suæ præd' totaliter amisit, &c. And there is another precedent against a dyer, &c., quod idem Henricus in mansione sua præd' ob metum infectionis per horridum fœtorem fumi, fœditatis, et aliorum sordidorum, &c., per magnum tempus morari non audebat. So, in the case at bar, forasmuch as the declaration is, that the defendant, maliciously intending to deprive the plaintiff of the use and profit of his house, erected a swine-stye tam prope aulam et conclave ipsius Willielmi, ac sues et porcos suos in ædificio illo posuit, et ill' ibid' per magnum tempus custodivit, ita quod fœtidi et insalubres odores sordidorum præd' suum et porcorum præd' Thomæ in aulam, &c., penetran' et influen', idem Willielmus et

*352] famuli sui, &c., in messuag' prædict' *conversantes existen' absque periculo infectionis in aulâ, &c., continuare seu remanere nno potuerunt, prætextu cujus idem Will' totum commodum, &c., maximæ partis præd' messuag' per totum tempus præd' totaliter perdidit. To which declaration the defendant pleaded not guilty, and was found guilty of the matter in the declaration: it was adjudged that the plaintiff should recover." The corruption of the watercourse in the case there put, was as much the act of a free agent as the lighting of the fire was here. [CRESSWELL, J.—I presume the stream was permanently corrupted. The nature of the user was continuous. Not so of a chimney.] In the one case, foulness was created and communicated to the stream; in the other, the corruption was communicated to the atmosphere surrounding the house. In Mumford v. The Oxford, Worcester, and Wolverhampton Railway Company, there was nothing of a permanent nature in that which was complained of: there was no allegation of a continuance of the noises. Pollock, C. B., says,—"The hammering and noises may be stopped and the shed removed at any time." And Bramwell, B., says,—"The real injury results from the presumed intention to continue the noises. The premises are not depreciated in value by anything that has been actually done." [CRESSWELL, J.—Suppose the plaintiff's premises were demised for *ten* years, and the defendant's for *five*, and the defendant's tenant made the fires and caused the smoke,—could the plaintiff maintain an action against the occupier as for an injury to his reversion?] It is submitted that he might. Though, according to the ordinary course of events, the reversion would not fall into possession until the expiration of the ten years, nevertheless it *may* do so. [CRESSWELL, J.—Making fires in 1856, would not be a nuisance in 1857.] That depends upon whether the lighting the fires is to be looked at independently of the preparation of the place for lighting them. [CRESSWELL, J.—It *must be borne in mind that the building of the chimney was not
*353] the act of the defendant, but that of his landlord. Suppose this case:—The plaintiff has premises which are in the possession of a tenant under a lease which will last ten years: the proprietor of the adjoining land builds a forge and chimney, and lets them for five years; and his tenant makes fires, the smoke from which annoys the occupier of the plaintiff's premises: could the plaintiff sue the tenant for an injury to his reversion?] In the case put, the tenant did only part of the act the conjunction of which causes the injury. [CRESSWELL, J.—It is conceded that the mere building the forge and chimney, if nothing more were done, would be no injury to the reversion. That, therefore, brings it to the question whether the act here charged against the defendant is a thing of a permanent nature.] Several things must concur to give a cause of action,—the erection of the forge and chimney, the lighting of the fire, and the disturbance to the tenants, and the consequent diminution of the saleable value of the premises. [CRESSWELL, J.—Many

things of that sort would fail to give a cause of action: nuisances, for instance, arising from the formation of railways, and the like.] Those would be acts authorized by parliament; and in such cases ample provisions are made for insuring compensation to parties aggrieved. Here, the act is wrongful and actionable: any occupier might sue. The meaning of "permanent" in these cases, is not that the state of things must necessarily continue. [WILLIAMS, J.—In Tucker *v.* Newman, 11 Ad. & E. 40 (E. C. L. R. vol. 39), 3 P. & D. 14, building a roof with eaves which discharged rain-water by a spout into adjoining premises, was held to be an injury for which the landlord might recover, as reversioner, while they were under demise, if the jury thought there was a damage to the reversion.] The leading cases on this subject in comparatively modern times are Jesser *v.* Gifford, 4 Burr. 2141, and Tomlinson *v.* Brown, there *cited. Jesser *v.* Gifford was an action for erecting a wall, whereby the plaintiff's lights were obstructed. The declaration [*854 contained two counts: in the second, the plaintiff counted as the *reversioner:* and a verdict having been given for the plaintiff, with general damages, a motion was made to arrest the judgment, on the ground that the action would not lie by a *reversioner*, being only an injury to the person *in possession*. Aston, J., said, "he had looked into it, and had found a case S. P. with the present; and accordingly cited Tomlinson *v.* Brown, as of H. 28 G. 2, but it was determined in Easter Term, 1755. It was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. Mr. Norton, in arrest of judgment, objected that a temporary nuisance can't be an injury to the inheritance: it may be abated before the estate comes into possession: and he cited Some *v.* Barwish, Cro. Jac. 231; and observed, that, if this would hold, the defendant would be liable to a *double* action,—one by the possessor of the estate; the other by the reversioner. Mr. Crowle showed cause on behalf of the plaintiff, and insisted that it was a damage done to the *inheritance:* if the reversioner wanted to sell the reversion, this obstruction would certainly *lessen the value* of it. The court were of opinion that an action might be brought by one in respect of his possession; and by the other in respect of his inheritance, for the injury done to the value of it." Lord Mansfield.—"That is decisive:" and the rule was discharged. [CRESSWELL, J.—The nuisance there complained of was of a permanent nature: in the ordinary course of events, a wall will remain until something is done to prevent its continuance.] So, here, in the ordinary course of things, this chimney will continue to vomit forth smoke. [CRESSWELL, J.—If something else is done; if a fire is lighted in it. CROWDER, J.—Have you any *authority for saying that whether the obstruction or the nuisance is permanent or not is a question for the jury? WILLIAMS, J. [*855 —This court so treat it in Kidgill *v.* Moore, 9 C. B. 364 (E. C. L. R.

vol. 67.)] Young *v.* Spencer, 10 B. & C. 145 (E. C. L. R. vol. 21), 5 M. & R. 47, was an action by a reversioner against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises: the defendant pleaded not guilty; and the jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it; whereupon the judge directed a verdict to be entered for the plaintiff with nominal damages, subject to a case: and, after argument, it was held that the plaintiff was not at all events entitled to a verdict; but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the court ordered a new trial. [WILLIAMS, J.—Lord Tenterden there puts it on the ground of the act having a tendency to destroy the evidence of title. CRESSWELL, J.—There was no question there made as to the injury being permanent. CROWDER, J.—Is it for the jury to say whether the nuisance is or is not of a permanent nature?] In Tucker *v.* Newman, 11 Ad. & E. 40 (E. C. L. R. vol. 39), 3 P. & D. 14, Lord Denman, in leaving the case to the jury, told them that it was for them to say whether the construction of the eaves was such as to cast the water on the plaintiff's premises; that there was, in his opinion, a fair case to show that permanent injury was created; that the dripping might possibly be injurious to the reversion; and that *it was for them to consider whether it was so or not.*" Here, the court are called upon to say that there was *no* evidence of any such injury as to sustain the action. "Permanent" with respect to a *trespass*, is not susceptible of the same meaning as it is when dealing with a question of nuisance. If *the nuisance affects the value of the reversion, *356] the reversioner, who is entitled at any moment to sell, has a right of action. It was proved here, and indeed it was perfectly obvious, that the saleable value of the plaintiff's premises was materially diminished by reason of the nuisance complained of. [CRESSWELL, J.—You do not, I presume, contend that everything that diminishes the saleable value gives a right of action?] Certainly not. It is true that the buildings alone do not produce the nuisance; but they are constructed for the purpose of carrying on a particular trade, which cannot be carried on without fires; and, the chimney being there, it must be assumed that it will continue to be used in the way complained of. In The King *v.* Moore, 3 B. & Ad. 184 (E. C. L. R. vol. 23), an indictment charged the defendant with keeping certain enclosed lands near the King's highway, for the purpose of persons frequenting the same to practise rifle-shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c.,

near the said enclosed grounds, discharging fire-arms, making a great noise, &c., by which the King's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situated in Bayswater, near a public highway there, into a shooting-ground, where persons came to shoot with rifles at a target, and also at pigeons; and that, as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable *consequence of his keeping ground for shooting pigeons in such a place. Littledale, J., in [*357 giving judgment, says,—"It has been contended, that, to render the defendant liable, it must be his object to create a nuisance, or else that that must be the *necessary* and *inevitable* result of his act. No doubt, it was not his object, but I do not agree with the other position; because, if it be but the *probable* consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." [CRESSWELL, J.—That case is rather wide of this: the defendant, by holding out his premises as a shooting-ground, enticed the parties to come there and commit the nuisances complained of. Was the case in the Year Book, T. 13 H. 7, fo. 26, an action by the reversioner?] It was. [CRESSWELL, J.—The case of the lime-kiln, cited in Aldred's case, 9 Co. Rep, 59 a, I presume was an action by the occupier. WILLIAMS, J. —There is some trace of the action in the note to Rich *v.* Basterfield, 4 C. B. 783, 805 (E. C. L. R. vol. 56),(*a*) by the name of Daulby *v.* Berch, M. 4 E. 3, fo. 36; Lib. Ass. Anno. 4, fo. 6, pl. 3; resumed, M. 5 E. 3, fo. 43, pl. 36.] The proper question for the jury in these, cases is, whether the reversion is injured.

O'Malley, Q. C., and *D. D. Keane*, in support of the rule.—It is conceded that there was nothing unlawful in the erection of this chimney: all that is complained of, is, the use that is made of it. The judgment in Tucker *v.* Newman, 11 Ad. & E. 40 (E. C. L. R. vol. 39), 3 P. & D. 14, was founded upon the fact that the thing itself which constituted the nuisance was permanent,—that is, something which would probably, and in the natural course of things, continue down to the time when the reversion would come into possession.(*a*) Upon the same principle it *was that an assize of nuisance was held to lie, in Trahern's Case, Gobd. 221, Case 221, for raising a house so high as to injure the [*358 plaintiff's windmill. But, in Rex *v.* Pappineau, 2 Stra. 686, it was held, that, where a nuisance is temporary, as, the steeping stinking hides, &c., in a watercourse, there need not be judgment that it be abated,—

(*a*) And see Fay *v.* Prentice, 1 C. B. 828 (E. C. L. R. vol 50).

the nuisance arising, not from the erection of the mill, but from the use that was made of it.(a) In Baten's Case, 9 Co. Rep. 53 b, a distinction is taken between a nuisance which is of a temporary character only, and one which is permanent. In Hopwood v. Schofield, 2 M. & Rob. 34, where it was held that a reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right, Patteson, J., says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case; but Jackson v. Pesked, 1 M. & Selw. 234, and all the authorities show that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent, which, it is in evidence, can be redressed in a few days?" So, here, how can that be said to be an injury to the plaintiff's reversion, which is but the act of to-day, and which may possibly not be repeated to-morrow? Rich v. Basterfield, 4 C. B. 783 (E. C. L. R. vol. 56), was decided upon a ground which must dispose of this case. The action was brought against the owner of premises, for a nuisance arising from smoke issuing out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage; and it was sought to be sustained on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein: but it *359] *was held that the action would not lie. The building the chimney here gives no cause of action: and the intention to light future fires gives no cause of action. [WILLIAMS, J.—When was the expression "permanent injury" or "permanent nuisance" first used with reference to this subject?] As early, at all events, as the case of Rex v. Pappineau. The injury, in order to sustain this action, must be to the property, and not to the personal comfort of those residing there: smoke and noises, therefore, differ materially from the erection of a wall or projecting eaves, or the darkening of a light. Mumford v. The Oxford, Worcester, and Wolverhampton Railroad Company, 1 Hurlst. & N. 34,† is expressly in point. It was there held, that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent. Pollock, C. B., says: "The hammering and noises may be stopped, and the shed removed at any time. In order to give a right of action to a reversioner, the injury must be of a permanent character." And Alderson, B., said: "A reversioner cannot maintain an action for an injury not necessarily permanent. This injury is not in its nature permanent. Till the reversioner comes into possession, he is not prejudiced. There was no evidence to be left to the jury, and nothing to lead to the inference that the injury would be permanent, except the presumed intention of the defendants to continue the nui-

(a) And see Rex v. White and Ward, 1 Burr. 332.

sance." Here, the tenant may have full compensation for the injury complained of. To hold this action to be maintainable, would be to subject the defendant to damages twice over for precisely the same thing. The fact of the tenants quitting, or requiring a reduction of rent to induce them to stay, affords no ground of action. Besides, here, the tenants had not in *fact left, nor were the rents reduced. [*360 The plaintiff, in effect, sues because he apprehends a damage or injury.

After the argument, the following additional authorities were referred to by *Keane*,—Humphry *v.* Dame Brown, Dyer, 319 b, and Bower *v.* Hill, 1 Bro. P. C. 555. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action for an injury to the plaintiff's reversion by erecting a manufactory on land adjoining the plaintiff's houses, and causing smoke to issue from a chimney, and making loud noises. The plaintiff also complained of a nuisance arising from the lighting of wood fires in the yard adjoining the factory.

The cause was tried before Lord Campbell, at the last assizes for Norfolk, when his lordship ruled that the nuisances merely of a temporary nature, such as the wood fires and the noises, would not support the action: but, with reference to the smoke issuing from the foundry chimney, he thought the case distinguishable from Mumford *v.* The Oxford, Worcester, and Wolverhampton Railway Company, 1 Hurlst. & Norm. 34,† and that there was evidence to go to the jury to prove injury to the reversion: but he reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no injury to the reversion.

A rule nisi having been obtained accordingly, cause was shown in the course of the last term, before my Brothers Williams and Crowder and myself.

The only point reserved for our consideration, was, whether there was evidence for the jury of any injury to the reversion in the premises of which the plaintiff was owner, but not the occupier, they being let to tenants.

The evidence was, that the defendant erected a *factory with [*361 forges and a chimney within a few feet from the yards of the plaintiff's houses; that fires were lighted in the forges; and that the smoke issuing from the chimney caused annoyance to the plaintiff's tenants, the soot entering their windows and dirtying and spoiling the furniture in the rooms; and that the tenants had in consequence given notice to quit.

On the argument, it was insisted that the injury done by the defendant need not be of a permanent nature, and that it was sufficient if proved to be of such a description as would cause the reversion in the premises to sell for a smaller sum if brought into the market.

After considering the authorities, we are of opinion, that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character.

The earliest instances of such an action are, cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former cases, the thing done was not removable or remediable during the term: in the third, it was; but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance.

The decision in Jessel *v.* Gifford, 4 Burr. 2141, falls within the same principle. A window was obstructed; the obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. Tucker *v.* Newman, 11 Ad. & E. 40 (E. C. L. R. vol. 39), 3 P. & D. 14, belongs to the same class.

Now, the building erected in this case did not injure the plaintiff's inheritance: but it is said that the use made of it did. The real subject-matter of complaint, therefore, is, not the erection of the building, but causing smoke to issue from it. If the fires had not been made *362] *by the defendant, he could not have been sued for an injury either to the possession or the inheritance: Rich *v.* Basterfield, 4 C. B. 783 (E. C. L. R. vol. 56). Now, making the fires and causing smoke to issue, was not an act of a permanent nature. It is very like the case of Baxter *v.* Taylor, 4 B. & Ad. 72 (E. C. L. R. vol. 24), where a person trespassed, asserting a right of way; and not distinguishable from Mumford *v.* The Oxford, Worcester, and Wolverhampton Railway Company, where the action was brought against the defendants as occupiers of certain sheds, for making noises therein, which caused the plaintiff's tenants to give notice to quit.

The real complaint by the reversioner is, that he fears the defendant, or some other occupier of the adjoining premises, will continue to make fires and cause smoke to issue from the chimney: and, if the reversion would sell for less, that is not on account of anything that has been done, but of the apprehension that something will be done at a future time.

According to the authorities, we feel bound to say that this is not such an injury as will enable the reversioner to maintain an action The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS

IN

Hilary Term,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1857.

The Judges who usually sat in Banco in this term, were,—

COCKBURN, C. J.,	CROWDER, J.,
CRESSWELL, J.,	WILLIAMS, J.

MEMORANDA.

On the 27th of January, Sir Edward Hall Alderson, one of the Barons of Her Majesty's Court of Exchequer, died, in the 70th year of his age.

He was succeeded by William Fry Channell, Serjeant-at-Law, who took the oaths on the 14th of February, and shortly afterwards received the honour of knighthood.

On the 4th of March, Charles Wilkins, Serjeant-at-Law, died at his Chambers No. 8, King's Bench Walks, Temple.

*364] *PATIENCE SWINFEN v. FREDERICK HAY SWINFEN.

Jan. 12.

The court will not dispense with *personal* service of a rule nisi for an attachment for disobedience of a rule.

A compromise having been entered into by the plaintiff's counsel on her behalf at the trial, and embodied in an order of Nisi Prius, afterwards made a rule of court—upon a motion against her for an attachment for refusing to perform it, on the ground that it was done without her authority and against her express instructions:—Held, that the dissent of one of its members was enough to justify the court in declining to attach the plaintiff.

The order having been made upon the trial of an issue out of Chancery—*quære*, whether this court had jurisdiction to make it a rule of court, and whether the application to enforce it should not have been made to the court of equity?

As to how far counsel and attorneys may bind their clients by acts done by them in court, in the absence of *express* authority,—*quære?*

The proper time for an application for leave to file affidavits in answer to "new matter," under the 17 & 18 Vict. c. 125, s. 45, is, when the new matter has been brought before the court by the other side; and, *semble*, that these also may be answered at the proper time.

THIS was an issue directed by the Master of the Rolls to try the validity of the will of one Samuel Swinfen, deceased.

The issue came on for trial at the Spring Assizes at Stafford in 1856. At the close of the first day, negotiations for an arrangement took place between the leading counsel for the respective parties, and ultimately the following terms were agreed upon and embodied in a memorandum which was signed by the Attorney-General on the part of the defendant, and by Sir F. Thesiger on the part of the plaintiff, to the following effect:—

"Terms of compromise. Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of encumbrance, if any, created since death of Samuel Swinfen; such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity for her life on the estate of 1000*l.* a year, inclusive of the 300*l.* a year already secured to her on estate, also to date from Michaelmas, 1855. If any charge is existing on the estate created prior to the death of Samuel Swinfen, the interest to be borne in equal moieties. Plaintiff's costs as between attorney and client, not exceeding 1250*l.*, to be paid by defendant. Power to either party to make this agreement a rule of court. In event of any question arising on the above terms, the
*365] same to be referred to Sir *F. Thesiger and the Attorney-General. The house and grounds to be occupied by plaintiff without payment of rent, till Michaelmas next."

This memorandum was embodied in an order of Nisi Prius, which was afterwards made a rule of court; and, the plaintiff having refused to abide by it, an unsuccessful attempt was made in Trinity Term last, to enforce it by attachment: see Swinfen *v.* Swinfen, 18 C. B. 485 (E. C. L. R. vol. 86).

The Attorney-General, early in Michaelmas Term last, again obtained a rule nisi for an attachment of contempt against the plaintiff for dis-

obedience of the rule of court. The affidavits(*a*) upon which the motion was founded, stated that performance of the rule on her part had been duly demanded of the plaintiff, and an engrossment of a conveyance of the Swinfen estate tendered to her for execution, together with a deed (executed by the defendant) to secure to her the annuity or rent-charge stipulated for by the order of Nisi Prius, when she refused to execute the conveyance or to perform the engagement entered into by her counsel on her behalf at the trial.

The Attorney-General, on a subsequent day, upon a suggestion that the plaintiff was evading the service of the rule, applied for leave to serve it by leaving a copy at her residence, and also with her attorney and agent respectively, in lieu of serving the plaintiff personally.

CRESSWELL, J.—You must do the best you can to serve the rule. We cannot by anticipation say what sort of service will do. I very much doubt whether *anything* short of personal service will suffice in the case of an attachment. The rule had better be enlarged until the *last day but one of the term, to give the attorneys an opportunity of effecting the service. [*366

Service having subsequently been accepted on the part of the plaintiff,

R. Kennedy and *W. R. Cole* appeared to show cause upon affidavits of the plaintiff, her attorney (Mr. Simpson), and Sir H. Durrant.

Whateley prayed leave on the part of the defendant to answer the new matter contained in those affidavits, pursuant to the 45th section of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125. He stated, that, on moving for the rule, it was thought unnecessary to state anything in the affidavits about the compromise; but, that, finding that the affidavits which were about to be used on the other side went fully into the matters which were disposed of on the former motion, it was now thought advisable that affidavits should be filed in answer.

CRESSWELL, J.—We cannot at present say whether or not we are prepared to adhere to our former decision. But we cannot at the present stage of the proceedings grant this application. The affidavits which Mr. *Whateley* proposes to file, are to answer affidavits which by the courtesy of the counsel for the plaintiff have been handed to him for his inspection. To permit this now might be to allow the defendant to file affidavits in answer to something which may never appear upon the files of the court at all. If, upon cause being shown, matter appears which we think the defendant ought to have an opportunity of answering, this application may be renewed.

WILLIAMS, J., concurred.

CROWDER, J.—This point has already been decided by *this court on more than one occasion.(*b*) We may, in the exercise [*367

(*a*) In addition to those used on the former rule.

(*b*) See Wood *v.* Cox, 17 C. B. 280 (E. C. L. R. vol. 84), and Hayne *v.* Robertson, 17 C. B. 548.

of our discretion, when the rule comes on, allow affidavits to be filed in answer: but we must first be satisfied that they are necessary.

Kennedy, for the plaintiff, then proceeded to read the affidavits.—The plaintiff's affidavit was in substance as follows:—"I never, either before or after the commencement of legal proceedings, gave any instructions or authority to my attorney, or to any other person, to make any compromise on my behalf. After the commencement of legal proceedings, I gave my attorney no other instructions than to support the will of my father-in-law, and to maintain its validity and integrity. I was a witness on the trial of this issue, on Saturday, the 15th of March last." "After the examination of myself and five other witnesses, and at about 6 o'clock, the judge adjourned the court; and I have been informed, and believe, that, immediately afterwards, and before leaving the court, Sir F. Thesiger, my leading counsel, had a conversation with the judge, and that he caused the other counsel and my attorney to follow him to his lodgings. I went from the court to the Swan Hotel, and shortly afterwards was informed by my attorney and his London agent, Mr. Cole, that Sir F. Thesiger wished to see me. I went, accompanied by Mr. Cole, to Sir F. Thesiger's lodgings. On arriving there, I was informed by Sir F. Thesiger that the Attorney-General had offered to give me an annuity of 1000*l.*, on condition of my relinquishing the Swinfen estate. Sir F. Thesiger strongly urged me to accept the offer. *I told him I would not accept that or any other offer.* He persisted in urging me to accept it, and at length said that he had had
*368] an *intimation from 'high quarters,' which he was not at liberty to name, that the case was likely to go against me, and it was better to save something from the wreck. I understood him, by the expression of 'high quarters,' to mean the judge. Nevertheless, I had no fear as to the result, and desired to get nothing but what I was justly entitled to. I said to Sir F. Thesiger *that I would not listen to the proposal;* that I only wanted my own; that I wished the case to be tried by the jury, and would abide by the verdict; and that I considered it my duty to support the will: but, upon his still pressing me, I requested Mr. Cole to fetch my friend, Sir H. Durrant, who had come with me to Stafford. Upon Sir H. Durrant's arrival, the substance of what Sir F. Thesiger had said to me was repeated to him: and Sir H. Durrant recommended that I should take a little time to consider the offer. To this I assented; and it was at once arranged that I should send my reply to Sir F. Thesiger by 1 o'clock the next day, in order that he might communicate it to the other side. On rejoining my attorney, I expressed my entire disapproval of the proposed mode of terminating the trial: and I told him (as was the fact) that I only took time to consider it, out of respect to counsel, especially as Sir F. Thesiger seemed so anxious on the subject; and I requested him to come early the next day to Swinfen for my reply. I then returned to Swinfen, which is at

a distance of twenty miles from Stafford. Early the next day (Sunday), my attorney reached Swinfen Hall; *and I immediately*, without any discussion, *expressed to him positively my resolution to reject the offer, and requested him to convey my answer to Sir F. Thesiger.* Sir H. Durrant said he fully agreed with me; and we both declared to him that the cause must stand or fall by the will, and that I would sink or swim. *My attorney had received no authority whatever from me, directly or indirectly, to accept any *other terms, or to give any new instructions to counsel;* and he left Swinfen Hall that [*369 morning with the simple direction to convey my refusal of the offer to Sir F. Thesiger. I am informed, and believe, that my attorney the same morning sent my instruction by the electric telegraph from Lichfield to Stafford, addressed to Mr. Cole, and that it was received by Mr. Cole and conveyed to Sir F. Thesiger at about 1 o'clock of the same day, and was then made known to the defendant's counsel. It was in the following words, '*The offer is refused.*' I was not informed, nor had I the least reason to suspect, that there would be any further negotiation for a compromise; and, from the circumstance of my counsel consulting me on the said offer, I concluded that they would not, nor could, assent to any arrangement without my sanction. My attorney had advised me to come to Stafford by the first train from Lichfield on Monday morning, to be present at the trial. I therefore went from Swinfen to Lichfield in time for the first train, and travelled by that train to Stafford in company with Sir H. Durrant and several of my witnesses. We found a car waiting for us at Stafford station; and a gentleman named Barron informed us that an arrangement was going on in court, and that we must make the utmost haste. We went immediately to the court-house, and we arrived there a minute or two (as I am informed and believe) after a juror had been withdrawn. We passed from the outer hall of the court-house into an ante-room, and there met Sir F. Thesiger. He said to us,—'It is all settled: I have compromised the case: I have done my best for you,'—or words to that effect. Sir H. Durrant asked, with an expression of surprise, 'By whose authority?' Sir F. Thesiger replied, after a little hesitation, addressing Sir H. Durrant, 'By yours;' to which Sir H. Durrant rejoined,—'The deuce you did!' Sir F. Thesiger made no reply to this, but left the room immediately." "My *attorney soon afterwards came into the [*370 ante-room. I expressed to him my astonishment and resentment at what had been done, and my determination not to submit to the compromise. My attorney said that he had nothing to do with it. Being informed that my cause was at an end, I left the court-house with Sir H. Durrant, and returned home. Since that time, I have never done anything to ratify or confirm the compromise, nor anything which might lead my opponents to believe that I intended to ratify or confirm, or that I acquiesced in it: but, on the contrary, I have in various ways

signified to them my disapproval of the compromise, and my resolution to repudiate it and contest its validity. And I am informed and believe that some time in March last, and after the assizes, the London agents of my attorney, or one of them, communicated that resolution to Mr. Frere, the defendant's attorney; and, on the 2d of April last, the firm of Mr. Frere wrote to my attorney informing him that they had instructed counsel to prepare a supplemental bill to enforce the agreement; and I was then informed by my attorney, that, if I meant to contest the compromise, I must leave my opponents to take proceedings against me in equity to enforce it, and I must meet it there." "On the 9th of June last, I declined to execute a deed which was tendered to me by Mr. Greene; and I referred him to my solicitor for further information; and I am informed and believe that my London agent informed the attorney on the other side that it was of no use to tender any deed to me, as I would not sign it." "The value of the Swinfen estate is about 65,000*l.*; and the annuity which I should take under the agreement, is worth 10,000*l.*; and I had previously resigned, without litigation, to the next of kin a sum of 7000*l.* and upwards given me by my father-in-law, to which I believe, and am advised, I might have established a good title. The agreement was *improvident, inasmuch as it contained no stipulation for the discontinuance of the proceedings in equity and in Doctors' Commons then and still pending at the suit of the defendant against me as devisee and executrix under the said will. The validity of the will was not a mere pecuniary question; for, it involved my character as one necessarily acquainted with the state of mind of the testator, and peculiarly capable of forming a correct opinion of his competency to make a will. Even if the agreement had been advantageous to me in a pecuniary point of view, yet, considering the circumstances under which it was effected, I could not conscientiously have availed myself of it. I verily believe, as I believed at the trial, that my cause is a just one, and that the will of my father-in-law is valid and ought to be upheld, and that I should have obtained a verdict in my favour if the case had been suffered to go to the jury. It is my desire to have a full and fair trial of the issue directed by the Master of the Rolls; and I refuse to ratify the unauthorized and illegal act of my counsel."

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Mr. Simpson's affidavit,—after corroborating that of the plaintiff as to what took place down to the morning of Sunday, the 16th of March, —was as follows:—"On my return to Stafford in the afternoon, I was informed by Mr. Cole that Sir F. Thesiger wished to see me at 8 o'clock the next morning; and Mr. Cole made an appointment accordingly. The next morning, I called with Mr. Cole upon Sir F. Thesiger, and in the first place informed him that I had no authority to re-open the treaty; and I stated that I was quite sure that Mrs. Swinfen would entertain no other offer than on the basis of the whole estate for her life.

I had made a memorandum to this effect in writing, which, to the best of my recollection and belief, I then gave to Sir F. Thesiger, and he read it in my presence, and left for the purpose of speaking to the Attorney-General. I did not see Sir *F. Thesiger again, nor did I know what steps had been taken, until the counsel met in court at 9 [*372 o'clock. They began immediately to correspond and confer in court in the presence of the judge and jury, and also went out of court apparently for that purpose. Sir F. Thesiger, in the course of a short time, informed me that the defendant, who was in court, and the Attorney-General, expressed their willingness to abide by their former offer, and to give a sum of money for the costs; to which I stated my positive dissent. The conference was still proceeding; and I reminded Sir F. Thesiger that I had no authority to negotiate any compromise for my client; to which Sir F. Thesiger replied, that he would take all the responsibility on himself jointly with his colleagues. Refusing to have any concern in the affair, I left the court, and after a short time was sent for by Sir F. Thesiger, who was then in conversation with the Attorney-General; and the latter put a question to me respecting the Swinfen estate, which I answered. Soon afterwards, I received a written request from Mrs. C. Swinfen, who was in attendance as a witness, to speak to her in the hall of the court-house. I went to her; and both she and her husband most earnestly requested me to put a stop, if possible, to the proposed agreement, and said that they were quite sure Mrs. Swinfen would repudiate it, and refuse to submit to it. I then returned to Sir F. Thesiger; and, as Mrs. Swinfen was expected every minute, I requested him to wait for her arrival; but he did not comply with my request; and a juror was withdrawn a few minutes before her arrival. The conference between the respective leading counsel continued nearly an hour and a half, from the beginning to the conclusion." "I do not know whether the agreement was drawn up and signed before or after a juror was withdrawn. I was not asked to peruse it. My attention was directed to the alienation of the estate, and my objection was to *that condition. I particularly urged to Sir F. Thesiger [*373 that he was making a mere commercial bargain, and therefore I could not act as Mrs. Swinfen's attorney on such a basis. I distinctly understood that he admitted this. I left the court soon after Sir F. Thesiger, and found Mrs. Swinfen in the ante-room. She was in great distress, and reprobated the transaction, in the presence of her witnesses and many other persons."

Sir Henry Durrant's affidavit was in substance as follows:—"I was present at the trial of the above-named cause on Saturday, the 15th of March." "Soon after the adjournment of the court, I went, at the request of Mr. Cole, to Sir F. Thesiger's lodgings, when I found the plaintiff with Sir F. Thesiger and some other counsel. The plaintiff asked Sir F. Thesiger to repeat to me what he had said to her. He then

stated that the Attorney-General had offered to give her 1000*l.* a year and the costs of the trial, if she would relinquish the estate to Captain Swinfen, the defendant. He said also that the case was going against the plaintiff." "I made no answer to Sir F. Thesiger, but looked at the plaintiff, and said to her, 'This requires a little time for consideration.' I said so, thinking it advisable that we should talk over the matter by ourselves. I returned with the plaintiff that evening to Swinfen Hall. We talked about the proposed compromise. She made up her mind instantly to reject it; and I entirely concurred with her. The next morning, Mr. Simpson, her attorney, came to Swinfen Hall. I was present at his interview with the plaintiff. She declared her resolution to reject the offer of the Attorney-General, and desired her attorney to convey her answer to Sir F. Thesiger. She said that she would stand or fall by the will, or words to that effect: and I said that I approved of her resolution. On the Monday morning, I went with the plaintiff to Stafford, in order to attend the trial. On arriving at the Stafford station, we were informed that we must make haste to the court, as there *was a negotiation going on between the counsel. The plaintiff and myself were both greatly surprised, as we had not the least suspicion that such a thing would be done. We hastened to the court-house; and, upon entering the ante-room, through which the witnesses have to pass into the court, we met Sir F. Thesiger, who accosted us and said that he had done his best, and compromised the case. I asked him directly by whose authority he had done so; and Sir F. Thesiger, looking at me with some confusion of manner, said, 'By yours.' I replied instantly, 'The deuce you did!' and was proceeding to say more, but Sir F. Thesiger walked quickly away. The statement of Sir F. Thesiger, that he acted by my authority, is wholly untrue. I never assumed to give any authority upon the subject; nor had I any authority from the plaintiff so to do."

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CRESSWELL, J.—The affidavits having now been used, we think the defendant should be allowed to file affidavits in answer.

Whateley.—The affidavits which, if the court see no objection to that course, it is proposed to put in, are those of Sir F. Thesiger, Mr. Alexander, Q. C., Mr. Whitmore, Q. C., and Mr. Gray, who were the counsel for the plaintiff at the trial, detailing what took place there so far as they were concerned

CRESSWELL, J.—I am of opinion that there is no *legal* objection to the reception of the affidavits proposed. The court cannot take upon themselves to give any opinion as to the propriety of counsel making affidavits.(*a*) Every gentleman is the best guardian of his own honour, and the best able to decide for himself whether or not it is fitting for him to make an affidavit. It is not a question of *professional confidence; but the question is, what was the authority given. All we can say is, that the affidavits may be filed.

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(*a*) Such an affidavit was made in Elworthy v. Bird, Tamlin, 38.

WILLIAMS, J.—The only question that can be put to us is a question of law: and, as a matter of law, there clearly is no objection to the affidavits proposed.

The affidavit of Sir F. Thesiger was to the following effect:—"I was the leading counsel engaged on the part of the plaintiff in the matter of an issue directed by the Court of Chancery to try the validity of the will of Samuel Swinfen, deceased, and which issue came on for trial at the Spring Assizes at Stafford in the present year. I have read a copy of an affidavit made in this matter by Charles Simpson, the plaintiff's attorney, sworn the —— day of November instant, which professes to give an account of what took place at the trial with reference to a compromise between the parties which was then effected under my advice and through my instrumentality, but which in many respects is entirely contrary to my recollection of the circumstances. At the close of the first day of the trial, I had reason to believe that the plaintiff was in some danger of an adverse verdict; and I desired Mr. Simpson to bring her to my lodgings, requesting Mr. Alexander and Mr. Whitmore, the other counsel who were with me in the cause, to attend. I pointed out to the plaintiff the consequences of a defeat, and the desirableness of coming to some arrangement. I did not say that the Attorney-General, who was employed by the defendant, had offered an annuity of 1000*l.*; no such offer having been made by him: but, upon the plaintiff asking me what sort of an arrangement was contemplated, either I or the other counsel suggested the sum of 1000*l.* per annum as an amount which we all agreed in thinking would be reasonable. *The plaintiff said she would do nothing without her friend Sir Henry Durrant, under whose advice she had been acting: and, finding that he was in Stafford, I desired him to be sent for, and we repeated in his presence all that we had previously stated to the plaintiff. We separated that evening upon an understanding that they were to consider the suggestions which we had made, and communicate by telegraph the next day, being Sunday, whether (as I supposed) the counsel were to be at liberty to negotiate with the other side for an arrrangement. In the afternoon of Sunday, I received a communication by telegraph in these terms 'The offer is refused.' Mr. Whitmore and myself thought that the message did not exactly meet the case, as no offer had been made; but I believe we were all convinced that the idea of an arrangement must be abandoned, and we were prepared to proceed with the trial on the following day. On the Monday morning, Mr. Simpson came with Mr. Cole (his London agent) to my lodgings. Mr. Simpson in his affidavit states that he did so at my request. I have no recollection of my having requested his attendance upon me; and my belief is, that his visit was unexpected. On his coming into my room, Mr. Simpson told me that a circumstance had come to his knowledge which in his judgment made it extremely desir-

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able that the case should be arranged. Having previously entertained this opinion, I was strongly confirmed in my view that it would be for the interest of the plaintiff, by what Mr. Simpson communicated to me; and I said that I would instantly go to the Attorney-General and offer to take 1000*l.* a year, which I believed he would be willing to give. I have not the slightest recollection of Mr. Simpson having produced to me any written paper at this interview; and my firm belief is, that no such paper was produced. With the entire acquiescence and sanction
*377] of Mr. Simpson, I proceeded to the *Attorney-General. When I reached the lodgings of the Attorney-General, it only wanted a few minutes to the time of the court's assembling, and therefore our communication was very brief: but he at once agreed to the proposal that the plaintiff should receive 1000*l.* a year, as the basis of the arrangement. In consequence of the haste with which this took place, nothing was agreed upon on the subject of the costs; but, on our arrival in court, Mr. Simpson, having been informed of what had been agreed upon, endeavoured to stipulate for the payment of costs as between attorney and client. I proposed this to the Attorney-General, who objected to leaving the amount of costs indefinite, and suggested the naming of a certain sum. Upon this I inquired of Mr. Simpson, in the presence of Mr. Cole, what would be a proper sum to fix for the costs. He answered 2000*l.* The Attorney-General thought this sum extravagant, and said that the defendant's advisers considered that 1000*l.* would be amply sufficient. I then discussed with Mr. Simpson and Mr. Cole for some time the subject of the costs, and asked him (Simpson) to explain the mode in which he made up the amount. He did not satisfy me that the costs could possibly exceed 1500*l.*, which sum, therefore, *with his consent*, I agreed to take. The Attorney-General in the meantime had drawn up the heads of the arrangement; and, upon my sending over my proposal to take 1500*l.*, he inserted the sum of 1250*l.* for the costs, as the utmost he was disposed to give on this account. I was pressing Mr. Simpson not to prevent a beneficial arrangement, and one which he had urged me to make, by standing out for 250*l.*, when a friend of the defendant interfered, and induced him (the defendant) to declare his determination not to settle at all. After what I had heard from Mr. Simpson at my lodgings, I was certainly most anxious that the trial should not proceed; and I pressed the Attorney-General with
*378] the observation, that, *after we had substantially agreed, it would not be right for him to allow his client to recede. After considerable discussion, he at last said, that, unless I would consent on the part of the plaintiff to the proposed arrangement commencing as from the preceding Michaelmas, the plaintiff receiving an annuity from that time, and the defendant having the rents due at Lady-Day, no settlement could take place, and the trial must proceed. It was also insisted by the Attorney-General that the interest of any charges upon the

estate should be borne equally by the plaintiff and defendant. I found, upon calculation, that the difference between the amount of the rents and of the annuity would not be very great, and I therefore urged on Mr. Simpson the acceptance of these terms. *Mr. Simpson certainly more than once at this period of the negotiations requested me to wait till the plaintiff arrived*, who, he informed me, was expected in an hour; but I, fearing from the disposition of the defendant, that, if the trial was resumed, all hope of an arrangement was at an end, and considering it of great importance to the plaintiff's interests that this should not occur, especially after Mr. Simpson's impression of the expediency of settling the case had strongly confirmed my own, pressed upon Mr. Simpson to agree before it was too late; and, upon his hesitating, said that I must take it upon myself; to which Mr. Simpson made no objection, but said that I must defend him against his client. I immediately answered that I was willing, with my friends, meaning the counsel who were with me, to take the responsibility on myself: and I then signed the paper which had been drawn up by the Attorney-General, and which contained the final terms of agreement between the parties. It is not true, that, when the plaintiff came to my lodgings, or that at any other time, I told her that the Attorney-General had offered to give her an annuity of 1000*l.* a year; no such offer had been *made; and that sum was mentioned by myself or the other [*379 counsel, as a suggestion, in the manner previously suggested by me. I did not say that I had had an intimation from high quarters, which I was not at liberty to name, that the case was likely to go against her; nor did I give her or Sir Henry Durrant to understand that I had had a private communication from the judge that the case was going against her. I told her that it appeared to me that the case was going against her, and urged the prudence of an arrangement, to prevent the consequences of an adverse verdict. The plaintiff did not say that she would not accept 1000*l.* a year, or any other offer: on the contrary, there was a considerable discussion as to terms of compromise; and, when the interview terminated, it was understood that the plaintiff and Sir Henry Durrant would take the whole matter into consideration, and send a decision on the following day. It is not true that I stated to Sir Henry Durrant that the Attorney-General had offered to give the plaintiff 1000*l.* per annum and the costs of the trial, if she would relinquish the estate to Captain Swinfen. I have already stated the mode in which the sum of 1000*l.* per annum was introduced into the discussion, and which statement is correct."

The statements contained in the above affidavit were corroborated as to the whole of the facts therein deposed to, by the affidavits of Mr. Alexander, Mr. Whitmore, and Mr. Gray (who were also counsel for the plaintiff at the trial),—the two former gentlemen expressly swear-

ing that Mr. Simpson never at any period of the discussion intimated that he was acting without authority from his client.

R. Kennedy showed cause.—When this matter was before the court on the former occasion (18 C. B. 485 (E. C. L. R. vol. 86)), the mate-
*380] rials on which to form a correct judgment were *wanting. The court will not, therefore, hold itself bound by what took place then. [CRESSWELL, J., intimated that the argument would sustain no prejudice from what fell from the court upon the former rule.] The authorities upon this subject are numerous, and somewhat conflicting,—a confusion having been introduced into it from a want of properly distinguishing between the duty and power of the attorney and those of the counsel, and between the power to *refer* and the power to *compromise* a suit. The affidavits now before the court in some of their particulars are perfectly irreconcilable with each other, and lead to the irresistible conclusion that there is wilful misstatement on one side or the other. One thing, however, is manifest, viz. that the plaintiff never gave any authority either to her counsel or to her attorney to enter into the agreement that has been entered into on her behalf: and there is no case in the books which has decided that either counsel or attorney has authority to enter into a compromise involving matters foreign to the record, without the consent of the client. The counsel is the advocate, not the agent of his client. His instructions may be more or less vague; but, whatever they are, he must confine himself strictly within their limit. Most of the cases have arisen out of matters addressed to the discretion of the court, and those chiefly in courts of equity, where a larger degree of latitude is allowed than in actions at law, where the issue to be decided is upon the record. The form of the venire shows that this must be so; for, neither the court nor the jury have power to do anything else than to try the issues presented to them. Counsel may, indeed (his brief having been delivered), withdraw the record, or consent to a nonsuit or a verdict against him, or may assent to a verdict passing for a sum less than that claimed by his client: but he cannot travel out of the record: he is not the general
*381] agent of the client. All his authority is derived from *the instructions contained in his brief, with reference to the matters in issue upon the record: and it has been held that he is not answerable for any matter spoken by him relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but, if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is liable to an action at the suit of the party injured: Brook *v.* Sir Henry Montague, Cro. Jac. 90; Hodgson *v.* Scarlett, 1 B. & Ald. 232; Ahitbol *v.* Benedetto, 3 Taunt. 225, 2 Campb. 487; Richardson *v.* Peto, 1 M. & G. 896 (E. C. L. R. vol. 39); 3 Bl. Com. 29. Even the attorney's power, though necessa-

rily more extensive than that of the counsel, is limited to steps in the cause.(*a*) The distinction between the powers and duties of attorneys and those of counsel, are well pointed out in Story on Agency, § 24, and Colquhoun's Summary of the Roman Civil Law, Vol. 3, § 2207, and in two very able articles in the Law Magazine,—Vol. 12, p. 26, and Vol. 20, p. 269. It has been decided that an attorney may refer a cause to arbitration—Filmer *v.* Delber, 3 Taunt. 486: but that proceeds upon this principle, that a reference is only a mode of trying the cause. It may be that counsel have the like authority, after brief delivered; but the authority is at all events limited to the *cause:* Baillie *v.* The Edinburgh Oil Gas Light Company, 3 Clark & F. 639. The strongest dicta in favour of the power assumed to be exercised here, are those to be found in Mole *v.* Smith, 1 Jac. & W. 673, and In re Hobler, 8 Beavan, 101. But, in equity, the counsel has a much larger discretion than he has at law; and, on the last-named occasion, the *language of the Master of the Rolls (Sir L. Shadwell) went much beyond the necessity of the case. Butterworth *v.* Clapham, in the note to Mole *v.* Smith, is somewhat at variance with Lord Eldon's dictum in the principal case. In Knipe *v.* M'Mahon, 4 Drewry & Warren, 295, the Lord Chancellor (Sugden) said that "counsel were perfectly justified in acting upon their own discretion and judgment, in determining whether a minor heir-at-law should take an issue of devisavit vel non, and that Lord Chancellor Eldon had expressed an opinion to the same effect." Elworthy *v.* Bird, Tamlyn, 38,(*b*) is a distinct authority to show that the court *will* in a case like this inquire whether or not counsel had the authority they professed to exercise. There, the husband, being prosecuted and found guilty at the quarter sessions of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*, and the court, adverting to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions which to some extent supported it. Upon a bill filed for a specific performance, it was held, that it was not incumbent on the plaintiffs to prove that the defendant *did* assent to the agreement entered into by his counsel, but on the defendant to disprove [*382

(*a*) In Richardson *v.* Peto, 1 M. & G. 896 (E. C. L. R. vol. 39), Tindal, C. J., says, "The attorney admitted to prosecute or defend represents his client throughout the cause; but a counsel represents his client only when speaking for him in court."

(*b*) See this case, upon demurrer to the bill for want of equity, 2 Sim. & Stu. 372. And see 18 Price, 222, 9 J. B. Moore, 430 (E. C. L. R. vol. 17), 2 Bingh. 258 (E. C. L. R. vol. 9).

*383] it; that the *weight of the evidence being that the defendant did *not* dissent, the court would conclude that counsel had authority; and that the plaintiffs were entitled to a decree for a specific performance, with costs. The Master of the Rolls (Sir John Leach) said: "This agreement concludes the parties; and the only question is, whether the counsel had sufficient authority. *In the absence of evidence*, a court will conclude that he had authority; for, it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides: but, *after duly considering it, I come to the conclusion that counsel had no authority which would bind his client.* The defendant, it is true, objected when the arrangement was first proposed: but, *the question is, did he not afterwards, impressed with the weight of his counsel's reasoning, assent?* His *counsel swears* that such arrangement was concluded between the parties, and Mr. Bird was present. The chairman, in passing sentence, said, 'I impose a nominal fine upon you, because you have entered into the arrangement.' It necessarily follows that the plaintiffs are entitled to a decree for a specific performance, with costs." No case is to be found where counsel has been held to have power to bind his client, where he acts in defiance of his client's instructions, and against his will. An agreement entered into with the defendant's assent at sessions, was upheld in Porter *v.* Cooper, 1 C., M. & R. 387,† 4 Tyrwh. 456. Lord Langdale, in Hargrave *v.* Hargrave, 12 Beavan, 408, refused to enforce an arrangement very similar to the present. In Furnival *v.* Bogle, 4 Russ. 142, it is assumed that the client would not be bound by an agreement entered into by his counsel in ignorance or under a mistake of facts. In Colledge *v.* Horn, 8 Bingh. 119 (E. C. L. R. vol. 11), 10 J. B. Moore, 431 (E. C. L. R. vol. 17), Burrough, J., says that a statement made by a counsel upon his address to the jury, in the hearing of his client, is

*384] binding *on the client, if he makes no objection. But, in Machell *v.* Ellis, 1 Car. & K. 682 (E. C. L. R. vol. 47), Pollock, C. B., declined to hold the client bound by the opening of his counsel. In the case of attorneys, their authority extends over the whole course and progress of the cause. The attorney's acts bind his client; and, even where he acts without any authority, the party for whom he assumes to act is bound by what he does, except in the single case of the attorney being insolvent: Anonymous, 1 Salk. 88; Mudry *v.* Newman, 1 C., M. & R. 402;† Bayley *v.* Buckland, 1 Exch. 1.† In equity, the rule is different: there, the attorney is required to have an authority in writing: Pinner *v.* Knights, 6 Beavan, 174; Hood *v.* Phillips, 6 Beavan, 176. In Bodington *v.* Harris, 1 Bingh. 187 (E. C. L. R. vol. 8), the court set aside a consent rule to abate a nuisance, on the ground that it had been agreed to by the defendant's attorney without his assent, and against his express directions. Thomas *v.* Hewes, 2 C. & M. 519,† 4 Tyrwh. 335, is also a strong authority to show that the court ought not

to interfere to enforce the agreement by this summary process. There are numerous cases to show that there are limits to the authority even of the attorney. Thus, an authority to proceed in an action to recover a debt, does not warrant the attorney in opposing the party's discharge in the insolvent debtors' court: Drake *v.* Lewin, 4 Tyrwh. 730. So, the attorney has no power to discharge a defendant from execution. The American courts repudiate the right of attorneys and counsel to make compromises without express authority from their clients: Holker *v.* Parker, 7 Cranch, 436; Maule *v.* Maule, 4 Dev. 368; Robert *v.* The Commercial Bank, 13 Louisiana, 532. Then, this is not a case in which there is any necessity for resorting to an attachment for the purpose of enforcing the agreement. It raises an important question, which ought not to be disposed of summarily, and without giving an opportunity for *appeal. The granting or withholding an attachment is discretionary with the court: Stock *v.* De Smith, Cas. t. Hardw. 106; [*384 Wilmot *v.* Allen, there cited; Sir Thomas Hales *v.* Taylor, 2 Stra. 695; Thornton *v.* Hornby, 8 Bingh. 13 (E. C. L. R. vol. 21), 1 M. & Scott, 48 (E. C. L. R. vol. 28), 1 Dowl. P. C. 237; In re Cargey *v.* Aitchison, 2 D. & R. 222 (E. C. L. R. vol. 16); Hetherington *v.* Robinson, 4 M. & W. 608;† Stalworth *v.* Inns, 13 M. & W. 466,† 2 D. & L. 428; Peterson *v.* Ayre, 15 C. B. 724 (E. C. L. R. vol. 80); Hemmingway's Arbitration, 15 Q. B. 305(*b*) (E. C. L. R. vol. 69); 3 N. & M. 860 (E. C. L. R. vol. 28); Mendell *v.* Tyrrell, 9 M. & W. 217.† This is not an award, but a contract,—a contract relating to an interest in land, which the statute of frauds requires to be in writing and signed by the parties to be charged. This instrument is not signed. If it is a contract, why is it to be carried into effect by a judge's order or a rule of court? The only proper course is, to apply to a court of equity for a specific performance. Then, this was an issue directed by the Master of the Rolls, to inform the conscience of the court as to the validity or invalidity of the will of Samuel Swinfen. When an issue is so directed, the whole and sole control over the record is in the court which directs it. When this matter was before this court on the former occasion, it was supposed that the statute 8 & 9 Vict. c. 109, s. 19, made a difference in this respect. That, however, is manifestly a fallacy. Before that statute, when an *issue* was directed by the Court of Chancery, it was returned to the court from which it emanated, and nothing further was done with it here: but, where an *action* was directed to be brought, a writ issued, and the parties proceeded to trial as in ordinary cases, and all the subsequent steps necessary in the action were taken in the common law court. In the case of an issue, there could be neither judgment,—Dickenson *v.* Eyre, 7 Q. B. 307, n. (E. C. L. R. vol. 53),—nor execution, nor bill of exception,—Lewis *v.* Armstrong, 3 Mylne & K. 52,—nor writ of error,—King *v.* Simmonds, 7 Q. B. 289, 312; *Thorpe *v.* Plowden, 2 Exch. 387,†—nor an amendment at Nisi Prius under [*386

the 3 & 4 W. 4, c. 42, s. 23,—James v. Lynn, 13 Q. B. 845 (E. C. L. R. vol. 66),—nor an endorsement of a special finding upon the record, under s. 24,—Brown v. Hutchinson, 13 Q. B. 185. The statute does not affect to deal with the jurisdiction: and, if the court assumes the power of enforcing this arrangement by attachment, it will be indirectly doing that which by law it cannot do directly. In a case of Bird v. Kerr, now pending before Wood, V. C., a motion for a new trial of an issue which was tried before Willes, J., at the last assizes at Newcastle, was made in the court by which the issue was directed. And such has always been the practice, whether before or since the 8 & 9 Vict. c. 109. It will probably be urged on the other side, that it would operate injustice upon the defendant to deprive him of the benefit of this compromise, after he has incurred expense in relation to it. But the answer to that, is, that the defendant is in no worse position in that respect than is every one who finds he has been dealing with an unauthorized agent: he may have a remedy against the agent: per Bayley, B., in Thomas v. Hewes, 2 C. & M. 530, n.;† Kennedy v. Gouveia, 3 D. & R. 503; Russell on Arbitration, 2d edit. 27. [The learned gentleman(a) *387] *concluded by observing in very unmeasured language upon the affidavits of the plaintiff's counsel; and contended, that, upon the whole, it was manifest that they had not the authority which they professed to exercise in entering into the compromise.]

W. R. Cole also appeared to show cause against the rule. He submitted, that Mrs. Swinfen's refusal to hold herself bound by the compromise entered into on her behalf, was not a wilful contempt of the order of the court, but was founded upon a bonâ fide conviction that she was not compellable to carry out an agreement to which she was no party, and which had been made not only without her sanction, but in defiance of her express prohibition; that, this being a proceeding against which there was no appeal, the court would only act upon the clearest and most unequivocal evidence; and that the rule of practice which requires parties to come prepared with proper materials at first, had never been relaxed in a case of this sort.(b) He then proceeded to urge the several points, and to cite the several authorities following:—

1. That the rule should have been reserved in a proper manner, and

(a) Towards the close of his argument,—the court having been adjourned from the 24th of November to the 1st of December, *Kennedy* asked leave to file fresh affidavits on the part of the plaintiff, in answer to the affidavits of Sir F. Thesiger and Messrs. Alexander, Whitmore, and Gray, under the 17 & 18 Vict. c. 125, s. 45.

He urged, in excuse for the lateness of the application, that he had had no opportunity of consulting with his client as to the contents of those affidavits when they were placed in his hands on the former day.

CRESSWELL, J.—Had you asked at the time for an opportunity to examine the affidavits, the court would probably have had no difficulty. The course now proposed, after so long an argument, is fraught with extreme inconvenience. If the plaintiff were allowed now to file new affidavits, we should probably be asked the same indulgence by the other side, and the case would never end.

CROWDER, J.—The application should have been made at the time. It is now too late.

(b) The former rule was discharged expressly without prejudice to a renewed application.

performance at the same time demanded; the practice of the court requiring that all necessary steps for obtaining an attachment shall be taken *at the same time*,—Rogers *v.* Twisdel, 3 Dowl. P. C. 572; Doe d. Sturges *v.* Ward, 2 Dowl. N. S. 706; The King *v.* Smithies, 3 T. R. 351; Dodington *v.* Hudson, 1 Bingh. 410, 8 J. B. Moore, 510 (E. C. L. R. vol. 17); Swinfen *v.* Swinfen, 18 C. B. 485 (E. C. L. R. vol. 86).

*2. That a proper deed should have been tendered to the plaintiff at the time of the service, for her execution; that the [*388 deed then tendered was in many respects objectionable, and one she was not bound to execute; and that the defects were not cured by the deed subsequently prepared,—Tebbutt *v.* Ambler, 2 Dowl. N. S. 677; Doe d. Williams *v.* Howell, 5 Exch. 299;† Vonhollen *v.* Knowles, 12 M. & W. 602;† Manning *v.* Bailey, 2 Exch. 45.†

3. That the rule of court was too loose and indefinite to warrant an attachment, even supposing it to be valid as an agreement; that it did not order any specific act to be done by the plaintiff, or provide how the deed was to be settled in case of difference, or order the plaintiff to deliver up possession of the house and grounds, or identify the land she was to occupy until Michaelmas, or dispose of the Chancery suit or of the process in Doctors' Commons,—Doe d. The Earl of Cardigan *v.* Bywater, 7 C. B. 794 (E. C. L. R. vol. 62).

4. That the agreement on which the rule of court is founded, was made on the trial of an issue directed by the Court of Chancery, and therefore the obviously more convenient course would be to leave the defendant to apply to that court to enforce it; especially as there were other questions pending in the equity suit,—8 & 9 Vict. c. 109, s. 19; Luard *v.* Butcher, 2 C. B. 858 (E. C. L. R. vol. 52), 3 D. & L. 815.

5. That the rule of court is founded upon the agreement; and that the court had no jurisdiction to set aside the agreement if invalid, and therefore ought not to give itself jurisdiction by deciding in a summary manner that the agreement was valid.

6. That, if the rule gave the court jurisdiction, it was one which they might properly decline to exercise in a summary manner, inasmuch as they would thereby preclude the plaintiff from taking the opinion of a jury as to the facts, and of a court of error as to the law,—Thomas *v.* Hewes, 2 C. & M. 519 (E. C. L. R. vol. 52); and that it is only in *plain cases that an attachment is granted,—Bodington *v.* Harris, [*389 1 Bing. 187 (E. C. L. R. vol. 8).

7. That, although counsel are in the first instance to consider and decide whether or not they have sufficient authority to refer a cause upon terms, yet such decision is not conclusive upon the client, who may (if he can) negative such authority.

8. That, although the court will, in the absence of proof to the contrary, infer that counsel had sufficient authority to refer a cause upon terms, yet such inference may be rebutted by evidence, and no such

inference will be drawn in the face of sufficient proof to the contrary, —Mole v. Smith, 1 Jac. & W. 673; Furnival v. Bogle, 4 Russ. 142; In re Hobler, 8 Beavan, 101; Welch v. Nash, 8 East, 394; Thompson v. Ingham, 1 L. M. & P. 216; In re Chew v. Holroyd, 8 Exch. 249;† Bunbury v. Fuller, 9 Exch. 111, 140.†

9. That the power of counsel to *compromise* a cause does not stand upon the same footing as the power of counsel to *refer* a cause upon terms; and that the court will not infer a power to make a disadvantageous compromise, but the authority of the client must be *proved*,—see the cases refered to by Mr. *Kennedy*, antè, p. 381.

10. That the reservation of future power to counsel, contained in the agreement, made it bad in toto; and that, at all events, the court would not *infer* an authority to that extent,—Roll. Rep. 214; Watson on Awards, 104; Thinne v. Rigby, Cro. Jac. 315; Winch v. Sanders, Cro. Jac. 584; In re Tandy and Tandy, 9 Dowl. P. C. 1044.

11. That upon the affidavits, it clearly appears that the plaintiff never authorized the compromise, but, on the contrary, expressly and distinctly objected to it, and has never in any manner ratified it; that Simpson, her attorney, had no authority from her to make or sanction any such *390] compromise; and that the want of such *authority in Simpson was well known to the counsel when they took upon themselves the responsibility of making it.

12. That, inasmuch as the case involves a serious question of law, viz. as to the extent of the power of counsel to bind their clients by a compromise, and also a serious question of fact, viz. whether Simpson did, in violation of his duty to his client, and in spite of her express direction to the contrary, authorize or sanction the alleged compromise,—the court ought not to determine those questions in a summary manner (and in the absence of Simpson, who was no party to the rule), and so deprive the plaintiff of her right to take the opinion of a court of error; but should leave the defendant to enforce the alleged agreement by action, or by a bill in equity for a specific performance.

Whateley, Q. C., *Keating*, Q. C., and *E. James*, Q. C., in support of the rule.—The main question is as to the extent of counsel's authority to enter into a compromise of this sort on behalf of the client, in his absence. That the counsel in this particular case acted with good faith, and exercised a sound discretion, there can be no doubt. The concession on the other side as to the extent to which counsel in the conduct of a cause may bind the client, is ample enough to embrace this case. Circumstanced as the case was at the time the compromise was agreed to, the counsel would have been wanting in duty to their client if they had abstained from doing as they did. The client being absent, the hearing of the cause about to be resumed, the counsel are informed by the attorney that a circumstance has just come to his knowledge which makes it highly expedient that the matter should be compro-

mised. What that matter was, does not appear. It may be that Mr. Simpson had employed his London agent, shortly before he received instructions to prepare the will in question, to take proceedings with *a view to a commission of lunacy against the testator, and he had ascertained that the defendant's counsel were in possession [*391 of proof of that fact; and so he might think it expedient, for the sake of his client's character and his own, to withdraw from the contest upon the best terms which could be obtained. The question depends more upon principle than upon authority; but authority is not wanting. Mole *v.* Smith, 1 Jac. & W. 673, contains an intimation of opinion from a very eminent lawyer. "It is for Mr. Shadwell to consider," says Lord Eldon, "whether he is authorized to give his consent for the widow. *If he does I must act upon it; and she will be bound by it.*" So, in Furnival *v.* Bogle, 4 Russ. 142, it is distinctly laid down that a party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion. Can it be said in the present case that there was any fact the knowledge of which was essential to the exercise of their discretion, of which the plaintiff's counsel were ignorant? If Mrs. Swinfen had disapproved of the arrangement, she should at once have repudiated it. Instead of adopting that course, though the arrangement was made on the 15th of March, it was not until the 1st of April that any intimation was given to the defendant that she disapproved of it. The observations of Lord Lyndhurst, in Furnival *v.* Bogle, 4 Russ. 146, are extremely strong upon the point. He says: "I must consider the case as if Mr. Furnival's solicitor, Mr. K., had been in court, and assented to the order. His clerk was in court when Mr. Sugden made the proposition. Some communication took place between Mr. Heald and him. He did not object to the arrangement; and I must presume that he immediately communicated what had occurred to his principal, K. *It was the duty of the solicitor, if* [*392 *he dissented from *the order, to have given immediate notice of his objection.* Saturday and Monday elapsed: on the Tuesday morning, a new solicitor is appointed, and then, for the first time, an objection is made to the order. If Mr. K. had been in court, and had assented to the arrangement, it would have bound his client. He has adopted it; for, it was communicated to him, and he did not object to it. The client must therefore be bound." The cases of Thomas *v.* Hewes, 2 C. & M. 519,† 4 Tyrwh. 335, and Hargrave *v.* Hargrave, 12 Beavan, 408, have very little bearing upon the present question. In the former, Bayley, B., expressly guards himself against laying down any rule as to the extent of the authority of attorneys and counsel: and the latter, so far as it goes, is rather an authority for the defendant. The court must always bear in mind that the defendant will be seriously preju-

diced by the withdrawal of the arrangement. He had no means of knowing that the authority of the plaintiff's counsel to enter into it would be questioned; and he has incurred heavy expense upon the faith of it. It has been said that this court has no jurisdiction, because the issue was directed by the Master of the Rolls: but the complaint is, that a rule of this court has been disobeyed; and clearly no other court could enforce it by attachment. [WILLIAMS, J.—If this was an order of Nisi Prius, it might properly be made a rule of this court. CROWDER, J.—Can two litigant parties at any time consent to an order of Nisi Prius?] It is submitted that they can. Submissions to reference are commonly made rules of court. [CRESSWELL, J.—By authority of the statute 9 & 10 W. 3, c. 15. WILLIAMS, J.—In the case of a reference, the court performs its functions.] As to the service of the rule, there is no foundation for the objection urged. The service was in strict conformity with the practice of the court. A sufficient deed, it is sub-
*393] mitted also, was tendered for execution. And, a tall *events, it is not open to the plaintiff to make that objection, she and her attorney having positively refused to execute *any* deed. Neither is there any foundation for the objection that the order of Nisi Prius is too vague. It sets out the agreement, which upon the face of it purports to be a valid agreement, and one which the court will enforce. It was not for the defendant to prove the plaintiff's assent to or ratification of the agreement: it was incumbent on the plaintiff to show that she dissented, and that she communicated her dissent promptly: Elworthy *v.* Bird, Tamlin, 38; Furnival *v.* Bogle, 4 Russ. 146. If Simpson acted without authority,—and that *he* assented to the arrangement, is clear from all the affidavits,—the plaintiff may have a remedy against him; but still the agreement must stand. The business of the courts could not proceed, if, after counsel has acted upon the faith of his attorney having authority, the want of such authority should be held to annul any act done by him in court. Upon the whole, it is submitted that no sufficient reason has been urged against the propriety of enforcing this rule in the usual way. Cur. adv. vult.

CROWDER, J.—This was a motion for an attachment against the plaintiff for contempt in disobeying a rule of court. A rule nisi having been granted, cause was shown against it at the latter end of last Term, and on two successive days after Term. The case was argued before us at very great length, and the court took time to consider its judgment.

As I have the misfortune to differ from the opinion expressed by my learned Brothers when the former rule was discharged, and to which opinion they still adhere, I cannot but entertain serious doubts of the correctness of my own judgment. Nevertheless, I feel it to be my
*394] *duty to the litigant parties to deliver my opinion, together with the reasons on which it is founded.

Many points were made on behalf of the plaintiff in the course of the argument. But, as my opinion is in her favour upon the main point, it becomes unnecessary to pronounce any judgment upon the others.

The attachment is prayed against the plaintiff for not performing an agreement embodied in an order of Nisi Prius which has since been made a rule of this court. It seems to me that there is no sufficient proof of a valid agreement between the plaintiff and defendant to warrant the order of Nisi Prius, and that therefore the rule of court founded upon it cannot be enforced by attachment.

The order of Nisi Prius was made upon the trial of an issue directed by the Master of the Rolls, to try the validity of a will under which the plaintiff was devisee of an estate estimated by her of the value of 65,000*l.*; the defendant being the heir-at-law. The cause came on for trial at Stafford, on Saturday, the 15th of March, before my Brother Cresswell; and, after the examination of several witnesses on the part of the plaintiff, it was adjourned to the following Monday. On Monday morning negotiations took place in court, and an agreement was finally signed by the leading counsel on both sides, in the following words:—"Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of encumbrances, if any, created since the death of Samuel Swinfen: such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity for life on the estate of 1000*l.* a year, inclusive of the 300*l.* a year already secured to her on the estate, also to date from Michaelmas, 1855. If any charge is existing on the estate, created prior to the death of Samuel Swinfen, the interest to be borne in equal moieties. Plaintiff's costs as between attorney *and client, not exceeding 1250*l.*, to be paid by defend- [*395 ant. Power to either party to make this agreement a rule of court. In the event of any question arising on the above terms, the same to be referred to Sir F. Thesiger and the Attorney-General. The house and grounds to be occupied by the plaintiff, without payment of rent, till Michaelmas next." A juror was then withdrawn, and the cause terminated.

The plaintiff contends that this agreement was entered into by her counsel, Sir F. Thesiger, without her authority, and contrary to her instructions; and she refuses to perform it.

The defendant contends,—first, that Sir F. Thesiger had a special authority to make it on behalf of his client,—secondly, that, even if he had no special prior authority, the plaintiff subsequently ratified the agreement,—thirdly, that, independently of any special prior authority or subsequent ratification, Sir F. Thesiger had an implied general authority, arising from his position as counsel in the cause, to bind his client by that agreement.

After the fullest consideration of the affidavits, and of the arguments on both sides, I have not been able to satisfy my mind that the agree-

ment can be supported on either of those grounds. I think, therefore, that the rule for an attachment ought to be discharged, and that the defendant should be left to such other remedies as are open to him. And I have the less difficulty in arriving at this conclusion, when I consider, that, by making this rule absolute, we should be finally concluding the question against the plaintiff, without appeal; whereas, by discharging it, we should be allowing the defendant, if so advised, to have the matter further investigated before a tribunal from whose decision an appeal would lie to the House of Lords.

*396] First, as to the alleged special authority given to Sir *F. Thesiger, the case rests mainly upon the affidavits of the plaintiff, her attorney, and Sir Henry Durrant, on the one side, and the affidavits of all her learned counsel at the trial on the other.

Before adverting to the affidavits, I feel bound to express my decided reprobation of the unmeasured and unwarrantable language uttered by one of the learned counsel (Mr. *Kennedy*) who argued this rule for the plaintiff, against Sir F. Thesiger, directly charging him with the most dishonourable conduct. It is hardly necessary to say that such an unjustifiable attack could not have the slightest tendency to injure the well-established reputation of Sir F. Thesiger in the mind of the court: nor, indeed, could have any other effect than that of damaging its author. It is the unanimous opinion of the court that Sir F. Thesiger's honour remains entirely unsullied in this transaction.

Some discrepancies undoubtedly exist in the adverse affidavits, as might naturally be expected where the deponents are detailing conversations at several interviews. But, assuming, as I do, that Sir F. Thesiger's affidavit, and those of the learned counsel acting with him, are in all substantial particulars correct, I am by no means satisfied that any special authority was given, either by the client or her attorney, to enter into the agreement in question. As regards the plaintiff herself, it seems perfectly clear that she gave none. At a personal interview with her on Saturday, after the adjournment of the cause, a suggestion was made by her counsel that it would be prudent to put an end to further litigation, and to abandon her claim to the estate, if an annuity for her life could be obtained of 1000*l.* per annum. She took time to consider the proposition, and by electric telegraph on Sunday distinctly rejected it: and, from that time until her arrival in court on Monday morning, after the cause was at an end by the withdrawal of a juror, it

*397] *is not suggested upon any of the affidavits that any other communication was sent from the plaintiff herself, or that she had authorized her attorney to make any to her counsel. On the contrary, I think it is quite clear that she had not the most distant idea of acceding to any such terms, and that she came to Stafford with her witnesses on Monday morning with the sole intention of being present throughout the hearing of her cause, which was expected to last several days.

But then it is said that her attorney, Mr. Simpson, authorized Sir F. Thesiger to make the agreement, which therefore bound his client. I am strongly disposed to think, that, after counsel has had a personal interview with his client for the express purpose of obtaining authority to compromise, on a given basis, to which the client has declined to assent, the counsel ought not to act, even upon the direct instructions of the attorney, if at variance with the client's expressed determination. And I do not find it suggested in any of the affidavits that the plaintiff was supposed to have given any fresh instructions to her attorney, or to have changed her mind since the transmission of the telegraphic message. Indeed, any such idea is negatived by that part of Sir F. Thesiger's affidavit which refers to the anxiety expressed by Mr. Simpson for the arrival of his client, which was shortly expected, on the Monday morning, before any arrangement should be finally concluded.

It appears to me also, from the affidavits of Sir F. Thesiger and Mr. Gray, another of the plaintiff's counsel, that, although Mr. Simpson sanctioned the negotiations for a compromise, he declined to authorize the agreement in the terms in which it was signed by Sir F. Thesiger. The facts appear to be these:—On the Monday morning, Sir F. Thesiger was put in motion by a communication from his attorney, Mr. Simpson, that a circumstance had come to his knowledge which made it *extremely desirable, in his judgment, that the cause should be [*398 arranged. Sir F. Thesiger immediately called upon the defendant's leading counsel, and expressed his readiness to come to terms of settlement; and, at the sitting of the court, the negotiation was renewed, which terminated in the agreement in question. Mr. Simpson was fully aware of the steps which Sir F. Thesiger was taking, and was in court, and perfectly cognisant of the endeavours there making to effect an arrangement, on the basis of an annuity of 1000*l.* a year to the plaintiff, and the relinquishment by her of the estate. But it seems to me quite consistent with this state of things, that Mr. Simpson might have thought, that, on the arrival of his client, who was shortly expected in court, she would be induced to alter her mind by the representation to her of the circumstance which had led Mr. Simpson himself to deem a settlement extremely desirable,—not contemplating that the arrangement should be finally concluded without his client's sanction; and by no means intending to take the responsibility upon himself of giving instructions to counsel, against her express directions. Still, it may be a grave question whether Mr. Simpson, by his presence in court during the negotiation of counsel, and his tacit acquiescence, by offering no objection to it of which the opposite side could be aware, did not impliedly sanction the agreement, and so bind his client by it; for, neither his refusal to take upon himself the responsibility of the step, nor Sir F. Thesiger's expressed readiness to do so in conjunction with his learned friends, nor even Mr. Simpson's request to Sir F. Thesiger

to wait for the arrival of his client, appear by the affidavits to have been known to the opposite party.

The dictum of Lord Lyndhurst in Furnival v. Bogle, 4 Russ, 142, was referred to on this part of the case, to the effect, that, if the attorney
*399] had been in court when *counsel concluded the arrangement made in that case, he (Lord Lyndhurst) should have held the client bound by it. As, however, the attorney was not in court, but only his clerk, no decision was necessary on that point; amd the ultimate decision was, in fact, against the binding effect of the agreement, upon another ground.

Without deciding, therefore, conclusively that the agreement made by Sir F. Thesiger ought not to be held binding on the client by reason of the attorney's tacit acquiescence, I think it is sufficient to say that we ought not to grant an attachment for contempt against a party who under such circumstances refuses to perform it. Therefore, on the ground of any special authority given to Sir F. Thesiger either by his client or attorney, I do not see my way clearly to supporting the agreement.

Secondly, it is insisted that the conduct of the plaintiff after the termination of the cause amounted to a ratification of the agreement: and the correspondence between the attorneys on each side was referred to in proof of it, together with the fact that the plaintiff did not discharge her attorney, or in express terms inform the other side of her repudiation of the agreement until the month of June following the trial. But I do not find that the defendant's position has been at all altered by anything which has occurred subsequently to the trial: and it certainly was not the intention either of the plaintiff or her attorney to ratify the agreement; but, on the contrary, they always considered it so prejudicial to the interests of the plaintiff that they intended by every means in their power to resist it. I think, therefore, that the agreement cannot be supported on the ground of ratification.

Thirdly, it is contended, that, without any special authority previously given, or any subsequent ratification, Sir F. Thesiger, by the mere rela-
*400] tion of counsel to his *client, was invested with a general agency, and with power to bind her by any agreement he might in his discretion enter into on her behalf while conducting the cause in court.

It was assimilated in argument to the case of partners in trade, where a general agency arising from their relation as partners makes the acceptance of a bill of exchange by one binding upon the other, in favour of third parties, although, in the particular instance, the authority may have been expressly revoked. And it was further insisted, that, even if Mrs. Swinfen had come into court during the negotiation, and had expressly prohibited Sir F. Thesiger from proceeding, yet, unless she gave notice of her prohibition to the opposite party, she would have been bound by her counsel's signature to that agreement.

This introduces a question of very general and grave importance,—

far beyond the particular merits of the present case. Is counsel in the position of an agent clothed with any such general authority to bind his client? I must own, that, in the course of a somewhat long professional experience at the bar, I was never aware of the existence of such an extensive agency: and I was, therefore, much astonished at the proposition so broadly laid down by the counsel for the defendant in the course of the argument. We were not referred to any text-book, ancient or modern, in support of such a principle; nor to any positive decision in which such a doctrine has been established.

It is said that business could not be conducted in courts of justice, if counsel were not to trust each other as the authorized agents of their clients, and if the court were not to place implicit reliance on their acts. This is quite true with respect to all acts or admissions of counsel in the ordinary course of the conduct of a cause. He professes, in conducting a cause, to act entirely upon his *own judgment and discretion, uncontrolled by his client: and the client leaves the whole [*401 management of the cause to his counsel. But, where a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel then can only act, as I believe, under special instructions. Undoubtedly, by the courtesy of the bar, counsel in all cases repose entire confidence in each other as the authorized agents of their clients. When, therefore, opposing counsel confer together with a view to the settlement of a cause, each is supposed to act from his own client's express special authority, and each believes his opponent to be so acting. But I am not aware that any counsel engaged in making terms, ever supposed for a moment that his opponent had power to bind his client without express instruction. Each acts upon the assumption that his adversary has his client's special authority to enter into the arrangement, which otherwise could not be concluded. And the judge also presumes the special authority given, when he sanctions the drawing up of an order of Nisi Prius embodying the terms of the arrangement. If, therefore, in any such case, a counsel, under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client.

When a litigant party in a cause intrusts his brief to a counsel, his object is to have the benefit of his advocacy, and not to employ an agent to negotiate terms of compromise. Taking the general rule laid down in Smith's Mercantile Law, 5th edit. p. 134, to be correct, viz. that "the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment," can it be said that it is part of counsel's usual employment, not only to plead the cause of his client in court, but to negotiate for the division of the property in dispute between the litigant parties? A client might think a particular barrister *an excellent advocate, and therefore [*402 employ him, but might have no confidence in his power as a

negotiator of terms of compromise. And, taking the present case as an example, it would seem a strong thing to hold that counsel receiving a brief from the plaintiff in a feigned issue out of Chancery to try whether or not there was a valid devise of a large estate to her, has incidentally an implied authority to decide that his client shall agree to waive the question, and give up all claim to the estate, upon receiving a certain annuity for life.

We have been much pressed, in the course of the argument, with the serious consequences which may result to the opposite party from such engagements being avoided. But these are precisely such as may result in every case from the acts of unauthorized agents: for, the principal is never bound where the agent acts beyond the scope of his authority. Nor do I perceive the necessity of investing counsel with any such extensive agency: for, where a client wishes to give his counsel a discretionary power to compromise a cause, it is very easy to do so by special instructions: and, if the client gives no special instructions, it may fairly be assumed that he intends to give no power to compromise. But, if the law should be laid down, that counsel have, without special instructions, such a power vested in them, it will be necessary, in every case in which the client is determined to try his cause out, not only to give special instructions to his counsel to make no compromise, but also to notify to the opposite party that he has so done; or else to be personally present at the trial, in order to be ready at a moment's notice to withdraw his brief from counsel, and thus revoke his authority. This would surely be attended with much inconvenience, and would be alike disagreeable to counsel and client.

The case of Filmer *v.* Delber, 3 Taunt. 486, has been referred to, in *403] which it was held that the attorney *had power to bind his client by an order of reference of Nisi Prius, without his assent, and even against his instructions. But the court there said that the client has a remedy against his attorney for any injury resulting from his acting without authority. Lord Tenterden, however, in Biddle *v.* Dowse, 6 B. & C. 255, 9 D. & R. 404 (E. C. L. R. vol. 22)—where the question was whether infants could be bound by the attorney's agreeing to refer,—seems to have carefully abstained from expressing any acquiescence in the decision of Filmer *v.* Delber: for, he says,—"Admitting, for the sake of argument, *but no further*, that the consent of the attorneys of such of the parties in the suit as were adult, might be binding upon them," &c.; then deciding that the infants at all events were not bound.

Attorneys are responsible to their clients for negligence or unskilfulness; but no action lies against the counsel for his acts, if done bonâ fide for his client. In this respect, therefore, the counsel stands in a different position from the attorney: and it is every day's experience at Nisi Prius, for counsel, when pressed by the judge to refer a cause, to inform the court, that, in the absence of any instructions, he has no

power to agree to a reference. And my firm conviction always was, and still is, that counsel is not justified in referring a cause against the client's consent; and that it is not within the scope of his authority. It has been thought by the legislature convenient for the due administration of justice that the presiding judge should have the power in certain cases to compel a reference of the whole or part of a cause.(*a*) But, before the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), I apprehend no judge had power to insist upon a reference, and no counsel, without the consent of his client, had power to agree to one.

*The cases mainly relied upon as establishing the extensive general agency of counsel, were, Mole *v.* Smith, 1 Jac. & W. 673, [*404 In re Hobler, 8 Beavan, 101, Hargrave *v.* Hargrave, 12 Beavan, 408, and Furnival *v.* Bogle, 4 Russ. 142.

Of these, Hargrave *v.* Hargrave most resembles in its circumstances the present case. A feigned issue had been there directed by the Court of Chancery, to try the legitimacy of the plaintiff, and at the trial a juror was withdrawn, upon an agreement entered into by counsel on both sides, without the instructions of their clients, for the division of the estate between the litigant parties. This agreement could not have been enforced in Chancery if the fullest authority *had* been given, because of the plaintiff's infancy, and the consequent want of reciprocity. The petition to the Master of the Rolls only prayed that the defendant should elect whether he would abide by the agreement, and, if not, that he should pay the plaintiff's costs thrown away upon the abortive trial. There is, certainly, some language of Lord Langdale in that case extremely strong to support the view of counsel's implied authority to bind his client, with respect to third parties, by such an agreement: but the decision against the defendant proceeded mainly on the ground that the defendant actually consented to the agreement at one time, after it was made, though subsequently he determined to repudiate it; for, Lord Langdale says,—"From the affidavits, I cannot doubt, that, beyond the general authority which the defendant's counsel had, there was either previously or subsequently an adoption or consent to the terms by the defendant. It is expressly stated, and not denied by the defendant, that he did at one time consent to the terms, and that he afterwards refused to be bound by them." And the agreement was set aside, and a new trial granted upon the terms of the defendant's paying all costs. Had Lord *Langdale been quite satisfied that the general implied authority of counsel was sufficient of itself to bind the defendant, [*405 it would have been needless to refer to his consent, which in that view was quite immaterial.

The other cases seem to fall within the ordinary scope of counsel's authority at the Chancery bar, where parties to the suit are obliged to give their consent to many important matters, through their counsel, in

(*a*) See Browne *v.* Emmerson, 17 C. B. 361 (E. C. L. R. vol. 84).

open court. Thus, in Mole v. Smith, counsel consented to his client's accepting in lieu of dower what the court might think her entitled to out of certain purchase-money. And Lord Eldon there said: "It is for Mr. Shadwell to consider whether he is authorized to give his consent for the widow. If he does, I must act upon it, and she will be bound by it." And so in the case of In re Hobler, 8 Beavan, 101, where a petition to tax a solicitor's bill had been dismissed without costs, by consent of the petitioner's counsel, a fresh counsel, on a subsequent day, applied to rescind the order, on the ground that his client had not authorized his former counsel's consent to the dismissal. Lord Langdale there said: "The business of the court cannot proceed unless credit is given to the statements of counsel that they have authority for what they do. They must themselves judge of the extent of their authority, under the ordinary responsibility. The petition must be dismissed with costs." The consent to the dismissal of such a petition was in the ordinary course of the practice of the court. And, unless counsel's word were to be taken as conclusive in such matters, it would be impossible that the ordinary business of the court could proceed. But these cases seem to me to have no very strong bearing upon that now under consideration. In Furnival v. Bogle, where an agreement had been made by counsel, without the plaintiff's authority, that the defendant should take money out of court, the decision was in favour of the plaintiff, and the agreement *was annulled. The ground of the decision certainly was, that the counsel for the plaintiff had acted without a knowledge of all the facts essential to enable him to exercise a sound discretion for his client. This case, therefore, would seem to be no authority in favour of the defendant.

*406]

The facts not known to counsel in Furnival v. Bogle were, that the client had before rejected the very same proposition to which the counsel had agreed. And Lord Lyndhurst, adverting to that circumstance, says: "If Mr. Furnival had been in court when Mr. Sugden made his proposition, I have no doubt he would have prevented the arrangement from being acceded to. And, if the circumstances to which I have referred had been communicated to his counsel, they would not have assented to the order; for, it is quite impossible that they should have considered themselves justified in acceding, in the absence of Mr. Furnival and his solicitor, to the proposal of Messrs. Bogle, had they been aware that a similar offer had been before made to him, and rejected; that, upon its being renewed, he returned no answer, which amounted to a second rejection; and that he had desired the utmost activity to be used in order to prevent the money being taken out of court."

Now, it appears in the present case, that the plaintiff, before the commencement of the litigation, had rejected an offer much more advantageous in its terms than those contained in the agreement in question; and that she had refused again to entertain the proposition, when

recommended to her by Sir F. Thesiger, after the adjournment of the cause on Saturday. It appears further, however, from Mr. Simpson's affidavit, that he had communicated to counsel the fact of his client's rejection of the former offer. In this respect, therefore, the present case differs from Furnival *v.* Bogle. But I think it may well be doubted whether Lord Lyndhurst would have *held Mr. Furnival bound by his counsel's agreement, if it had appeared upon affidavit that [*407 such agreement had been made with a full knowledge that it was in direct violation of his client's wishes and instructions, although with the honest intention of promoting his client's interests.

Lord Lyndhurst's decision, however, based as it is upon the counsel's ignorance of important facts, tends strongly to show that he did not hold the client conclusively bound by the agreement of his counsel, upon the ground of general agency, and implied authority; for, had he so held, the counsel's knowledge or ignorance of any fact, however essential to guide his discretion, would be wholly immaterial in considering whether the agreement was binding upon the client in favour of the opposite party, who would not know what facts had been stated to the plaintiff's counsel.

The case of Thomas *v.* Hewes, 2 C. & M. 519,† was also cited on the argument, and claimed by each side as an authority in his favour. In that case, the power of counsel and attorneys to bind their clients was much discussed, and considered. But Mr. Baron Bayley in his judgment cautiously avoided defining the extent of that power. He refused the application of Lord Falmouth, which was, to set aside an order of Nisi Prius embodying counsel's agreement on his behalf, and the rule of court made thereon, on the ground of want of authority, but said,—"If a distringas is applied for against Lord Falmouth, he may show that he has given no authority to his attorney to enter into this arrangement; and, if so, it is probable that the court would decline granting a distringas, and leave the plaintiff to his remedy by action. If we were to interfere in a summary manner, we should be preventing the parties from taking the opinion of a jury on the facts, and of a court of error on the law."

Although the judgment of Mr. Baron Bayley has no *very strong tendency either to support or to invalidate the agreement [*408 in the present case, it is, I think, a cogent authority in favour of our discharging the rule for an attachment; as, by doing so, we shall not preclude the defendant from endeavouring to establish the validity of the agreement in a court of law or equity, from whose judgment an appeal will lie to the highest tribunal.

I would only add, in conclusion, that I desire it may not be supposed from anything I have said, that I consider the plaintiff's counsel did not exercise a sound discretion for the benefit of his client, or that the agreement was not more advantageous to her than the continuance of a

doubtful conflict, in which defeat would have been the loss of everything. But still I think she was entitled, if so minded, to have the issue which the Master of the Rolls had sent for trial, disposed of by the verdict of a jury.

CRESSWELL, J.—The opinion expressed by my Brother Crowder in this important case, leaves my Brother Williams and myself no room for doubt as to the propriety of discharging the rule for an attachment; for, it is impossible for us to treat the plaintiff as guilty of contempt for refusing to perform an agreement by which one member of the court thinks she is not bound. As the validity of that agreement must be discussed before another tribunal, we are anxious that the question should be as little prejudiced as possible by anything that passes in this court. We therefore abstain from discussing it further, and from noticing the affidavits which have been laid before us, except for the purpose of expressing our commiseration for the unfortunate condition of the mind of one who could for a moment imagine that there has been anything to warrant an impeachment of the honour of the distinguished
*409] advocate who was during the *argument so unsparingly, so unjustifiably, and so disgracefully attacked.

The rule will be discharged: but, inasmuch as we think no fault can be imputed to the party making the application,—seeing that he had no reason to doubt that the arrangement made at Nisi Prius was made with the full concurrence of the plaintiff,—we all agree that it should be discharged without costs.

Rule discharged, without costs.(a)

(a) Proceedings to compel performance of the agreement are now pending in equity.

As to the authority of attorneys or counsel to bind their clients by compromise: Lewis v. Gamage, 1 Pickering, 347; Langdon v. Potter, 13 Sumner, 537; Huston v. Mitchell, 14 Serg. & Rawle, 307; Holker v. Parker, 7 Cranch, 436; Tankersly v. Anderson, 4 Dessaussure, 45; Hopkins v. Willard. 14 Vermont, 474; Vail v. Jackson, 15 Vermont, 314; Simonton v. Barrell, 21 Wendell, 362; Silvis v. Ely, 3 Watts & Serg. 420; Wilkinson v. Holloway, 7 Leigh, 277; Lockhart v. Wyatt, 10 Alabama, 231; Garvin v. Lowry, 7 Smedes & Marshall, 24.

EDWARDS *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. *Jan.* 29.

Service of a rule for an execution against a shareholder of a joint stock company, must be personal, or by leaving it at his place of abode: delivering it to his attorney, though at his request, will not do.

LUSH moved to make absolute a rule for execution against a shareholder in the Kilkenny and Great Southern and Western Railway Company. The rule had not been served personally on the shareholder: but, upon receiving notice of it, he referred to his attorney; and the attorney, receiving the rule, said that no cause would be shown.

COCKBURN, C. J.—The statute requires the rule to be served upon the party or at his place of abode. He has not been served; nor has any attempt been made to serve him; but his attorney has been served. It will not do.

The rest of the court concurring, Rule discharged.

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*In the Matter of the Complaint of THE CATERHAM RAILWAY COMPANY *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY and THE SOUTH-EASTERN RAILWAY COMPANY. *Nov.* 20. [*410

The court refused to grant a writ of injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31, on the complaint of a company having a branch on a trunk-line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus, than they charged for the conveyance of passengers to the terminus of *another* branch line (in which they themselves were interested) extending over the same number of miles.

To constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the *same* line or the *same portion* of the line.

To induce the court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line do not stop at the junction, or stop at inconvenient times, it must be distinctly shown that sufficient accommodation is not afforded to meet the fair requirements of the public.

It is no ground of complaint that the company working the main line refuse to grant third class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated.

But, *semble* that it is a good ground of complaint that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation.

THE 2d section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, enacts that "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of

carriages, trucks, boats, and other vehicles; and no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals *which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

*411]

The 3d section enacts that "it shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England to Her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of Her Majesty's superior courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court; and, upon the certificate to Her Majesty's Attorney-General in England or Ireland, or Her Majesty's Lord Advocate in Scotland, of the Board of Trade, alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate to apply in like manner to any such court or judge; and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint; and, for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode, and by such engineers, barristers, or other persons as they shall think *proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and, if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this act, by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoin-

*412]

ing obedience to the same; and, in case of disobedience of any such writ of injunction or interdict, it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of 200*l.* for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict; and such moneys shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to Her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the Court of Session; and, in *any such proceeding as aforesaid, such court or judge may order and determine that all or any [*413 costs thereof or thereon incurred shall and may be paid by or to the one party or the other, as such court or judge shall think fit; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relative to the matter of any such inquiry, and to administer any such oath."

By the 4th section, the judges of the Court of Common Pleas were empowered to make the rules and regulations necessary for carrying the act into effect. This was done by rules made in Hilary Term, 1854: see 15 C. B. 473.

And the 6th section enacts that no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner therein provided; but, that nothing therein contained should take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

The Caterham Railway Company was incorporated in 1854, by the 17 & 18 Vict. c. lxviii., entitled "An act for making a railway from the London, Brighton, and South Coast Railway to Caterham, in the county of Surrey." This railway, which commences at or near the Godstone Road Station of the London, Brighton, and South Coast Railway, was opened on the 5th of August last for the conveyance of passengers from the Godstone Road Junction to Coulsdon, Warlingham, and Caterham.

Upon the opening of the Caterham Railway, a table was issued, showing the times of starting of the several trains running between London Bridge and Caterham in conjunction with the trains of the Brighton and the South Eastern railway companies. This table showed trains running daily, as follows:—down trains, at 6.0 A.M., 9.30 A.M., 3.0 P.M., and 5.30 P. M.; and up trains, at 6.15 A.M., 8.15 A.M., 9.50 A.M.,
*414] 3.15 P.M., 5.5 P.M., *5.45 P.M., and 7.45 P.M. These several trains continued running down to the month of November, when a 6.45 A.M. down train was substituted for the 6.0 A.M. down train, and a 10.10 A.M. down train for the 9.30 A.M. down train, and an additional up train was granted, which arrived in London at 1.15 P.M., and certain alterations were made in the Sunday trains.

The South Eastern Railway Company are the proprietors of the main line between London and a point near New Cross; and the London, Brighton, and South Coast Railway Company are the proprietors of the rest of the line to the Godstone Road (or Caterham) Junction,—the distance between London and the Caterham Junction being 13 miles, and the entire distance to Caterham 18 miles.

The charges fixed by the above-mentioned table as the daily fares for conveying the public over the London, Brighton, and South Coast, South Eastern, and Caterham lines, to and from Caterham and London, were,—single journey tickets, first class 3*s.* 4*d.*, second class 2*s.* 10*d.*, third class 2*s.* 1*d.*, parliamentary 1*s.* 6*d.*: return tickets, first class 5*s.*, second class 4*s.* 3*d.*

Sir Fitzroy Kelly, Q. C. (with whom was *Wells*, Serjt.), on behalf of The Caterham Railway Company, moved for a writ of injunction, under the 17 & 18 Vict. c. 31, commanding the London, Brighton, and South Coast Railway Company, and the South Eastern Railway Company to afford to the Caterham Railway Company the same facilities as they afforded to the traffic on other branches on their respective lines, and to desist from giving any undue or unreasonable preference or advantage to or in favour of any other particular person or company, or any other particular description of traffic.

The motion was founded upon an affidavit of the secretary of the
*415] Caterham Railway Company, which, after *setting out the time-table above referred to, stated, that the times for starting the trains, as shown in the table, were very inconvenient, and the rates and fares excessive and unreasonable, and prejudicial to the interests of the Caterham Railway Company: That the charges fixed by the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company, as the daily fares for conveying the public over their said lines to and from Epsom and London,—a distance of about 18 miles,—were as follows:—single journey, first class 2*s.* 6*d.*; second class 2*s.*, third class 1*s.* 6*d.*; return tickets, first class 3*s.* 6*d.*, second class 2*s.* 9*d.*, third class 2*s.*: That the excess of daily fares charged the public travel-

ling on the Caterham Railway by those companies, over the daily fares charged by them to the public travelling on the Epsom branch line, was therefore as follows:—an excess of 10*d.* on the single journey in the first and second classes, and of 7*d.* in the third class, and of 1*s.* 6*d.* on return tickets by first and second class: [The affidavit then went on to show similar excess of charges as compared with those on the Wimbledon branch]: That the said companies do not issue third class return tickets to and from Caterham and London; and that the non-issuing of third-class return tickets on their lines to and from Caterham and London, and the issuing of them on the Epsom and Wimbledon, lines, was an unfair preference of the public travelling in third class carriages to and from Epsom and Wimbledon, and a disadvantage to the public travelling in third-class carriages to and from Caterham: [The affidavit then proceeded to show that the sums charged by the London, Brighton, and South Coast and the South Eastern railway companies, for single and return tickets, and also for annual or season tickets, to and from various other places on their respective lines, viz. Reading, Godstone, Shalford, Maidstone, and Tunbridge Wells, were considerably less in *proportion to the several distances than the sums charged to and from Caterham]: That the Caterham Railway Company, finding [*416 from experience of the working of the above time-table, that the accommodation afforded by the London, Brighton, and South Coast Railway and the South Eastern Railway Companies, was altogether insufficient for the working of their traffic and the convenience of the public using their line, made repeated applications to both companies for alterations to be made in the times of trains stopping at the Caterham Junction, and for additional trains: That these applications were not acceded to by the company, save to a very inadequate extent: That the trains now stopping at the Caterham Junction on their journey to and from London, stop at times that are inconvenient to the public living in the Caterham and surrounding districts: That it is necessary for the convenience of the public, that additional up and down trains should stop at the Caterham Junction to deliver and take up passengers: That it is necessary for the due development of the Caterham Railway, that facilities should be granted for passengers to travel to and from Caterham by excursion trains to various places on the London, Brighton, and South Coast Railway and the South Eastern Railway, and particularly to and from London: That application was accordingly made to the London, Brighton, and South Coast Railway Company, by the Caterham Railway Company, for such facilities, but that the same have not been granted by the said company to any beneficial extent: the result being, that, to the general public and excursionists, the Caterham Railway and district are almost unknown: And that there is a very large amount of traffic lost to the Caterham line by such facilities not having been granted; large numbers of vans and private carriages conveying every week during the summer

months to the Caterham district hundreds of people, the greater part
*417] *of whom, if proper accommodation were afforded at fair and reasonable rates, would travel by the said railway. The affidavit then set out a number of letters which had passed between the secretaries of the several companies as to the points in issue between them; and also showed, that, though at every other junction on the lines a proper covered place was provided for the convenience of passengers waiting for trains, there was none at the Caterham Junction.

Enough, it is submitted, appears upon the affidavits to show that the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company have been guilty of that which it was the express object of the statute to prevent. [CRESSWELL, J.—Do any persons who desire to travel by the Caterham Railway join in the application?] No; but the affidavits show that many individuals who have travelled by it have sustained inconvenience. The main ground of complaint is, the inequality in the amount of fares exacted by the London, Brighton, and South Coast Railway Company and the South Eastern Railway Company, from persons travelling on the Caterham line, as compared with the charges for similar distances on other branches. For instance, the Brighton company, being proprietors of the Epsom branch, charge about one-fourth more upon first and second class tickets for the journey from London to Caterham than they charge from London to Epsom, which is about the same distance, or a little more: and so in proportion for return tickets and season tickets. And this is one of the chief causes of injury to the Caterham line; and it is clearly an offence against the act, which prohibits the making or giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company," or the subjecting "any particular person or company, or any particular description of traffic, to any undue or unreason-
*418] able prejudice or *disadvantage in any respect whatsoever." [CRESSWELL, J.—The question you are calling on us to consider is, whether rival companies shall be allowed to compete with each other in the price of carrying passengers.] Not quite so. [CROWDER, J.—It is not denied that the same charge is made to everybody who travels on the line from London to the Caterham Junction.(a) Do you contend that the companies are bound to charge the same amount for similar distances on all parts of their respective lines?] The complaint is, that the particular charges are so apportioned as to place the Caterham Railway Company at considerable disadvantage in comparison with another company; and that the charges are excessive in themselves, and excessive in comparison with those made on other branches of the line similarly situated. The next ground of complaint is, that the

(a) The *only* persons so travelling in all probability are the very persons on whose behalf the Caterham Railway Company make the application, viz. those intending to proceed on their branch.

London, Brighton, and South Coast Railway Company and the South Eastern Railway Company refuse to allow certain trains to stop at the Caterham Junction, which are quite necessary for the convenience of persons travelling by the Caterham Railway. [CRESSWELL, J.—How is it sworn that the public sustain inconvenience from the non-stoppage of trains?] It is sworn distinctly that the trains now stopping at the Caterham Junction on their journey to and from London, stop at times that are inconvenient to the public living in the Caterham and surrounding districts; and that it is necessary for the convenience of the public that additional up and down trains should stop at the Caterham Junction. [CRESSWELL, J.—That is a very general statement of the secretary's notion that the times and the number of trains are *inconvenient.] It is rather of the times of stopping than of [*419 the insufficient number of trains that complaint is made. The other companies have no right, it is submitted, to prefer their own branch lines, and to refuse to afford equal facilities to the traffic on the Caterham branch. The third ground of complaint is, that the two companies named refuse to issue third class return tickets to passengers to Caterham. And the last ground is, that, although a proper covered place of waiting is provided at every other station or junction on the line, none is provided for the Caterham passengers; as to which the affidavits show that numerous complaints have been made of the inconvenience and annoyance thereby sustained.

CRESSWELL, J.—By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who are engaged in carrying on railway concerns; and therefore the court should be very cautious, before they set on foot an inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed. Four several grounds of complaint have been urged in this case. The first is, that the companies against whom the application is directed make unequal charges to persons travelling along their lines to the Caterham branch. It does not, however, appear that there is any inequality of charge to persons using the same portion of those lines: and it is not sufficient to show an inequality as compared with the rates charged on another line. The words of the 2d section of the act are, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person *or company, or any particular description of traffic, to any undue or [*420 unreasonable prejudice or disadvantage in any respect whatsoever." I apprehend that it cannot be said, that, because persons may travel between London and Epsom at a less rate than they can between Lon-

don and Caterham, any undue or unreasonable preference or advantage is given, or any undue or unreasonable prejudice or disadvantage imposed. I can see nothing upon the affidavits to show that any undue preference has been given to any particular person or company. All persons, it appears, who come from London to Caterham are charged alike. The second ground of complaint is, that a sufficient number of trains are not allowed to stop at the Caterham Junction, or that the times of stopping are inconvenient. It does not appear from the affidavits that there is any other station of a similar character on the same line, the traffic to which is of the same sort, where greater facilities are given. I therefore think that the applicant has not made out a case of undue or unreasonable prejudice or disadvantage in that respect, and consequently there will be no rule on that ground. The third ground of complaint is, that the London, Brighton and South Coast Railway Company and the South Eastern Railway Company refuse to grant third class return tickets to Caterham. It appears, however, by the time-bills referred to in the affidavits, that third class return tickets are not granted to any place on the line below Croydon. That ground, therefore, also fails. But with respect to the last ground of complaint, viz. the absence of a convenient covered station at the Caterham Junction, so that persons waiting for trains are exposed to the weather,—inasmuch as it appears that there are covered stations at all other places on the line, I think the absence of such accommodation at the Caterham Junction subjects persons travelling on the Caterham line to undue inconvenience and disadvantage, and therefore as to that the rule should go.

*421] *WILLIAMS, J.—I am of the same opinion. As to the first point, it seems to me that no case of undue or unreasonable preference or advantage in favour of any particular person or company is made out because passengers are carried at lower rates on other branches on the same lines. If it could be distinctly shown that the excess of charge on the Caterham branch was owing to a design on the part of the other companies to exclude the Caterham Railway Company from the benefits to be derived from the use of their lines, that would bring the case within the act. But no such case has been made out. As to the second point, I agree with my Brother Cresswell in thinking that no materials are before us to enable us to say whether or not more trains are necessary for the convenience of the public. That must depend upon the amount of population and a variety of circumstances which are not presented to us. Whether or not the London, Brighton, and South Coast Railway Company and the Eastern Counties Railway Company could reasonably be expected to stop their trains more frequently, or at other times, at the Caterham Junction, is a question which obviously must depend upon the profits likely to realized by it. No sufficient materials are before us to enable us to come to any con-

clusion upon the matter. As to the third class return tickets,—if it had appeared that the companies had been in the habit of granting third class return tickets to other places on their line beyond Croydon, and refused to grant them to Caterham, there might be ground of complaint. But the fact appears to be otherwise. The rule will, therefore, only be granted as to the last ground of complaint which has been urged, viz. the want of proper station accommodation at the Caterham Junction.

CROWDER, J.—Upon the first three points I agree with my Brothers Cresswell and Williams that there is no case *made out. The [*422 meaning of the act, as it seems to me, is, that railway companies shall so conduct their traffic that no undue preference shall be given to, and no undue prejudice imposed upon, any particular person or company, and that these words refer to persons and companies using the line from the same point of departure to the same point of arrival: and, when we find the same rate charged to every person travelling on the same portion of the line, I think the act does not apply. With respect to the number of trains, and the times of stopping, there is nothing in the affidavits to show that the companies have been guilty of any impropriety. It might be,—and that, I think, would be ground for our interference,—that sufficient accommodation is not afforded to meet the fair requirements of the public. But no such case is made out upon the face of these affidavits. As to the third class return tickets, the answer is, that, below Croydon, none are issued. With respect to the want of shelter from the weather at the Caterham Junction, I think that is a withholding a "reasonable accommodation" to which the public are entitled.

WILLES, J.—I am of the same opinion. The jurisdiction given to this court by the statute in question is one which the court ought not to exercise without being satisfied that there exists some serious public inconvenience. The concluding words of the 2d section show that it was the intention of the legislature in passing the act to provide a means of enforcing reasonable accommodation on the part of railway companies to the public. Rule granted accordingly.(a)

(a) The rule was not drawn up; the Caterham Railway Company considering that the single point upon which they had succeeded in obtaining the rule was not worth the contest; and the other companies not being unwilling to provide the accommodation which the court thought ought to be provided.

*423] *In the Matter of the Complaint of JOSEPH MORTON BARRET *v.* THE GREAT NORTHERN RAILWAY COMPANY and THE MIDLAND RAILWAY COMPANY. *Jan.* 20.

To justify the interference of the court to enforce the running of through trains on a continuous line of railways, under the second branch of the 17 & 18 Vict. c. 31, s. 2, it must be shewn that *public* convenience requires it, and that it can reasonably be done.

They will not interfere at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route,—no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation.

WELSBY, in Michaelmas Term last, on behalf of Joseph Morton Barret, obtained a rule to show cause "why a writ or writs of injunction should not issue against the Great Northern Railway Company and the Midland Railway Company, respectively, enjoining them to cause trains to run from their respective stations at Leeds, in the county of York, southwards to the terminus of the Great Northern railway at King's Cross, in the county of Middlesex, and northwards to the terminus of the North Western railway at Lancaster, by which passengers arriving at Leeds aforesaid from King's Cross, or from any other station on the Great Northern railway, on the south, or from Lancaster or any other station on the North Western railway, or on the Midland railway, on the north, and desiring to proceed from Leeds aforesaid to Lancaster or to any other station on the North Western railway, or on the Midland railway, on the north, or to King's Cross, or any other station on the Great Northern railway, on the south, may be forwarded from Leeds aforesaid without any unreasonable prejudice or disadvantage."

The application was stated to be made by the direction of the Board of Trade, for the purpose of taking the opinion of the court as to whether railway companies are compellable to book through traffic in all cases where their railway with those of other companies form one con-

*424] tinuous line of communication; and it was *founded upon an affidavit of the applicant himself, who deposed, in substance, as follows:—

That he has frequent occasion to travel between London and Leeds and Lancaster and the intervening towns: That he had occasion, on Friday, the 4th of July last, to travel between London and Settle, one of the towns upon the North Western railway between Leeds and Lancaster: That the said North Western railway is worked by the Midland Railway Company; and such North Western railway has its southern terminus between Settle and Leeds, at Skipton, in Yorkshire: That the Midland railway extends from Skipton to Leeds, and from Leeds the same Midland railway extends on the one hand to Rugby, where it

joins the London and North Western railway, which extends from Rugby into London, having its station at Euston Square; and, on the other hand, the same Midland railway extends from Leeds to Methley, where it joins the North Eastern railway; and such North Eastern railway extends from Methley to Askern, in Yorkshire, where it joins the Great Northern railway; and such Great Northern railway extends from Askern to London, where it has its station at King's Cross: That the line of railway from Settle, through Skipton, Leeds, Methley, and Askern, to London, is a continuous line: That the Great Northern Railway Company work continuous trains from King's Cross, in London, over their own line, over the North Eastern railway from Askern to Methley, and over the Midland railway from Methley into Leeds: That the said line from Settle, through Skipton, Leeds, and Rugby, to London, is also a continuous line, and continuous trains are worked by the London and North Western Railway Company from the Euston Square station in London to Rugby, and by the Midland Railway Company from Rugby to Settle: That the length of the said route from Kieg's Cross, in London, to Settle, is 19¼ *miles shorter than the said route from Euston Square station in London to Settle: [*425 That, on Thurday, the 3d of July last, the deponent wrote and sent the following letter to the secretary of the Great Northern Railway Company:—

"Sir,—I beg to give you notice, that, considering the railway companies under the Railway and Canal Traffic Act, 1854, as regards traffic intended to pass over more than one line of railway, are bound to book through, in any case where their railways form part of a continuous line, so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, I shall to-morrow demand to be booked by the train leaving King's Cross station at 9.30 A.M. through to Settle, in Yorkshire, to which place your railway and those of the Midland and North Western companies form a continuous line of communication. I beg further to state, that, in case you should refuse so to book through, it is my intention to apply to Her Majesty's Court of Common Pleas at Westminster for such remedy in that behalf as is provided by the said act."

That, on Friday, the 4th of July last, about 9.20 A.M., the deponent went to King's Cross station, and applied at the railway booking-office, to the clerk in charge there, demanding a ticket which would enable him to pass by the Great Northern railway through to Settle, in Yorkshire, by the express train then about to leave London at 9.30; and he offered to pay for such ticket: That the clerk, in answer to his application, said, "We do not issue tickets to Settle, but only to Leeds and Bradford in that direction:" That the deponent then took a ticket by the said train to Leeds, which is the furthest point upon the said route to which the Great Northern company work, and arrived at the Leeds

station at 2.30 P.M. of the same day: That, on his arrival, he inquired
*426] of the Great Northern officers, at their said station, *whether there was any train on to Settle, and was informed, as he believed the fact to be, that there was no such train, but that such trains only ran from the Midland station: That he then went to the Midland station in Leeds, to meet the next train to Settle, which started at 5.30 the same afternoon, booked himself to travel by such train, and arrived at Settle at 7.45 the same evening: That, if the train by which he travelled from London to Leeds had passed continuously from London to Settle, and travelled at the same rate at which it had passed from London to Leeds, the deponent would have arrived at Settle at about 3.45 on that afternoon, but, by the interruption of the journey from the want of such through train, he lost on his said journey about four hours.

[The affidavit then stated that a similar application was made on the 7th of July, for a through ticket by the 12.45 P.M. train from Settle to King's Cross, by the Midland, Great Northern, and North Western railways, and a refusal on the same ground, but an offer to book the applicant through to Euston Square. It then proceeded,—]

That, finding he could not procure a through ticket to King's Cross, the deponent took a ticket to Leeds, and travelled by the train leaving Settle at 12.45 P.M., and reached Leeds about 2.50 in the afternoon of the same day: That he was set down at the Midland station at Leeds, where he was informed and believed a train was waiting to carry passengers on to Euston Square; but he found no train going on to King's Cross; and he was obliged to go, and accordingly went, to the Great Northern station, which is about a quarter of a mile lower down the same street, and took a ticket for the first train going on to London, which left Leeds at 4.10 in the afternoon: That the deponent had then to stay in Leeds about an hour and twenty minutes between the arrival
*427] *of the train from Settle and the departure of the train for London; and he arrived in London that evening by such train, which is due at King's Cross about 9.30: That, although the Midland and Great Northern stations at Leeds are distinct, yet the Midland railway trains, in working from Settle into their own station in Leeds, pass by the entrance lines of the Great Northern station, and the Great Northern railway trains, in working from their station at Leeds to London, pass by the entrance lines of the Midland station; consequently there would be no difficulty whatever in the transfer of passengers, if the trains of the Midland Railway Company and the Great Northern Railway Company worked to the stations of each other: And that the route by the Great Northern line from Leeds to London is 19¼ miles shorter than the route by the Midland line to London; and, if the deponent had travelled from Leeds to Euston Square, he must have passed over that greater distance.

CRESSWELL, J.—As we are told that this motion is made with a view to some future legislation upon the subject, I think we ought to grant the rule. But I cannot help thinking that the applicant puts his case upon a very narrow ground. The grievance complained of, is, that he waited at Leeds two hours and a half for the purpose of saving 19¼ miles of railway travelling.

Sir Fitzroy Kelly, Q. C., *Mellor*, Q. C., and *Phipson*, now showed cause on behalf of the Midland Railway Company, upon an affidavit of the general manager of that company, which stated,—That the Midland railway extends from Rugby to Leeds, and thence northwards to Skipton, where the North Western railway commences, and extends through Settle to Lancaster: That, in Leeds, there are two separate and distinct stations, at a distance of about a quarter of a mile from each other,—one *called the Wellington station, belonging to and used by the Midland Railway Company,—the other, called the Central station, belonging in part, with the lines of approach thereto, to the Great Northern Railway Company, and used by them; but neither of the said last-mentioned companies has any power to use the station of the other in Leeds: That, between London and Leeds, there are two routes,—one, from the Wellington station of the Midland railway, thence by way of the Midland railway to Rugby, and thence by the London and North Western railway to Euston square station,—and the other of such routes from the Central station of the Great Northern Railway Company at Leeds, thence southwards over the Midland railway as far as a place called Methley, thence over a part of the Lancashire and Yorkshire railway from Methley to a place called Askern, and thence by the Great Northern railway to the King's Cross station in London; and over the first of such routes passengers are carried by the Midland and London and North Western railway companies; and over the last of such routes passengers are carried by the Great Northern company, who for that purpose run over the lines of the Midland company between Leeds and Methley, and the line of the Lancashire and Yorkshire company between Methley and Askern. [The affidavit then verified the books containing the different time-tables, and then proceeded]: That the Midland Railway Company have no power whatever to use the station of the Great Northern Railway Company at Leeds, or any part of the said Central station there: That the Great Northern and Midland railway companies are to a great extent rival and competing companies; and the two routes between Leeds and London, by Rugby on the one hand, and by Askern on the other, are rival and competing routes: *That, although the distance between Leeds and London is shorter by the *Great Northern to King's Cross than by the Midland route to Euston Square, yet, in the month of July, the fares for passengers were the same by both routes: That, if Barret had proceeded from Settle to London on the 7th of July mentioned in his affidavit, direct by*

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the route of the Midland and London and North Western lines to Euston Station, he would have arrived there at about 9.30 *the same evening; and, if he had proceeded from London to Settle on the 4th of July mentioned in his affidavit, by the route last mentioned, he might have remained in London till* 11.45 *A. M., and still have arrived at Settle at the same time as he arrived there by leaving the Great Northern terminus in London at* 9.30: That the Midland Railway Company work the line of the North Western railway under an arrangement by which a certain amount is secured to the North Western Railway Company; and the Midland company have, as it was their interest to do, used their best endeavours to accommodate and develope the traffic on the North Western railway: That the traffic on the North Western railway is comparatively very small; being chiefly short traffic of a local nature, and very little of it being through traffic to London: That the trains on the North Western line, as well as those on the Midland line itself, are fixed with reference to the convenience of the public generally using those lines of communication; and it is a matter of great difficulty, and requires the greatest consideration, especially with a view to the great number of junctions with other lines, to adjust their times of departure and arrival, and to fix the different stations at which they shall stop, so as to afford the greatest amount of convenience on the whole to the public generally: That, in fixing the times for the arrival and departure of the trains, and conducting the traffic on the Midland railway, and on the North Western railway, no undue
*430] or unreasonable preference *or advantage has been given to any particular person or company; but, on the contrary, all due and reasonable facilities have been given for receiving and forwarding all the traffic which has arrived or been presented: *That no complaint had ever been made, till that of Barret, with regard to the time of starting or arrival of any of the trains on the North Western railway, or otherwise with regard to the traffic passing between London and Settle, or any other part of the North Western railway:* That, in what is called booking through, the company issuing the ticket is understood to be answerable to the passenger for the whole journey, and for any damage or loss that may occur on any part of the journey, whether on the line of that company or on the line of any other company over which he is to travel; and that, however this system may be practicable between lines working together, and having similar interests, yet it is in its nature totally inapplicable to the case of rival and competing companies whose interests are adverse: That, although the line of railway from Settle, through Skipton, Leeds, Methley, and Askern, to London, might be said to be (physically speaking) continuous, there is not any station, nor any convenience or means whatever of transferring passengers from the line of the Midland company to the line of the Lancashire and Yorkshire company at Methley, where the line of the

Midland company in the direction of Askern ceases: That, with reference to the complaint of Barret, that, on arriving at the Midland station at Leeds, on the 7th of July, he found no train going to King's Cross, the deponent said that the Midland company had no power to run a train from Leeds to King's Cross station: And that he did not believe that the application was bonâ fide for the remedy of a real grievance under the act, but was made for an indirect object.

This is not a bonâ fide application: nor is any such *public grievance shown as to justify the interference of the court. [*431
In the first place, this is not a case within the act at all; and, if it were, the demand of the applicant is one which cannot reasonably or properly be complied with. The 2d section of the act consists of two branches:(a) The first branch is directed against the giving of undue or unreasonable preference or the imposition of undue or unreasonable prejudice. The second branch provides that every railway company having or working railways which form part of a continuous line of railway communication, or which have the terminus or station of the one near(b) the terminus or station of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf. Has the complainant here made out a fair case of unreasonable delay? His complaint is, that, wishing to proceed from London to Settle, he went to the King's Cross station of the Great Northern Railway Company, and demanded a through ticket by the 9.30 A.M. train; that, failing to obtain it, he was compelled to content himself with a ticket to Leeds, where he arrived at 2.30 P.M.; that, arrived at Leeds, he was obliged to proceed from the Great Northern station there to the Midland station, and was unable to start for Settle until 5.30, and consequently did not *reach his destination until 7.45. He demands that which he knows the [*432
company had no power to give him. If he had chosen to go to the Euston Square station of the North Western railway, he might have obtained a through ticket for Settle, by the London and North Western and Midland lines, at 11.45 A.M., and would have arrived at Settle much earlier than he did, viz. at 5.45 P. M. Is it to be said that any one of the public may at his pleasure call upon a railway company to put on a through train, and grant through tickets from any one place on their line to any other place in England or Scotland which may be reached by a continuous line? These companies are to exercise their

(a) See the section, antè, p. 410.
(b) Not exceeding a mile, such stations not being situate within five miles of St. Paul's Church, London: see s. 1.

powers under the various acts of parliament regulating them, for the general benefit of the public: but they cannot be called upon to do anything which is beyond the scope of those powers. [COCKBURN, C. J.—The applicant must, of course, make out a case of public inconvenience arising from the want of through trains: a mere private and personal inconvenience will not do.] No one complains but Mr. Barret; and his complaint is answered. The Great Northern Railway Company, who are the parties the most deeply interested, do not complain: on the contrary, they join in the opposition to this rule.

Denison, Q. C., and *R. Clarke*, showed cause on behalf of the Great Northern Railway Company, upon an affidavit by their general manager, which stated,—That the main line of the Great Northern railway extends from King's Cross, London, to York, in one direction, and to Leeds, Bradford, and Halifax in another; that the Great Northern line proper finishes at Askern, four miles north of Doncaster, but, from that point, the Great Northern company have running powers over the Lancashire and Yorkshire line to Knottingley, and thence by the North Eastern railway to York, and by the Midland line to *Leeds: That, by arrangements made by the Great Northern, the North Eastern, the North British, Edinburgh and Glasgow, Scottish Central, and Scottish North Eastern railway companies, the trains of the Great Northern company are timed so as to run in connexion with the trains of the said other companies through from London to Aberdeen, and vice versâ, and from Knottingley to Leeds, Bradford, and Halifax: That the North Western line between Kirby Lonsdale and Low Gill on the Lancaster and Carlisle railway, has never been constructed, although authorized by parliament: That the North Western railway is an incomplete line, producing very little traffic, and is now worked as a mere branch of the Midland railway between Leeds and Settle and Lancaster: That the Great Northern company would be willing to time their trains at Leeds so as to receive the traffic from the North Western railway, but it is impossible to do so without a re-arrangement of the trains of the North Eastern, the North British, the Edinburgh and Glasgow, the Scottish Central, and Scottish North Eastern companies, none of which companies are before the court on this rule: That the deponent was informed and believed that the said North Western Railway Company applied to parliament in the last session, to obtain running powers over the Midland (Leeds and Bradford) railway, the Lancaster and Carlisle railway, the Caledonian railway, and the Leeds Central railway station, and the several lines of approach thereto; and that the said several railway companies over whose lines running powers were sought appeared before the parliamentary committee of the House of Commons, to whom the said bill was referred, and strenuously opposed the powers thus sought to be obtained; and that, after a very protracted discussion, the committee reported against granting the running powers

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sought to be obtained, but intimated their opinion in favour of facility clauses being *granted over the Lancaster and Carlisle, the Caledonian, Glasgow and South Western, Midland, and Great Northern railways: and the deponent was informed and believed that facility clauses were accordingly prepared by the promoters of the said bill; and that, upon application being made to the standing orders committee to dispense with the standing orders, the application was opposed by some of the said companies other than the Great Northern, and the standing orders committee refused to dispense with the standing orders; and that the bill was accordingly not proceeded with: And that the deponent was informed and believed that the said North Western Railway Company have given notice of their intention to apply to parliament in the ensuing session for powers to extend their railway to a point on the Lancaster and Carlisle railway; but, in the event of this application being granted, the North Western railway cannot be made a line for through traffic between London and Scotland, viâ the Great Northern railway, without some legislative provision binding on all the other companies whose lines constitute a part of the route. [*434

Byles, Serjt., and *Welsby*, in support of the rule.—The companies are bound, where their railways form part of a continuous line of communication, so to conduct their traffic that no unreasonable delay or obstruction may be offered to the public desirous of using such railways as a continuous line of communication. The complaint is, that there is no through train to Settle by the shortest route; and the consequence is, that persons desiring to proceed by that route are compelled to wait two hours or two hours and a half at Leeds. It is no answer to that complaint, to show that a hostile company has a train which does not correspond with that by which the complainant wished to travel. [CRESSWELL, J.—I doubt whether that which is asked would be reasonable if the whole *line from London to Settle was in the hands of one company. Much less would it be so where the line belongs to two or more companies.] To justify the court in enforcing the provisions of this act, it is not necessary that any individual grievance should be specifically brought before them: it is enough to bring forward a state of facts showing a real and substantial cause of complaint. [*435

COCKBURN, C. J.—I am of opinion that no case has been made out by the complainant for the interposition of the court, and consequently that the rule should be discharged. I agree, that, to justify a party in calling upon the court to enforce the provisions of this act, it is not indispensably necessary to show a case of individual grievance: but it is clear that a case of public inconvenience must be made out. It does not appear, even upon Mr. Barret's affidavit, that there is any complaint of a want of sufficient accommodation on the part of the public: and it is clearly shown by the affidavits filed in opposition to the rule that no complaints have been made. I can quite understand that two competing

companies may so arrange the departures and arrivals of their respective trains as to operate injuriously to the shorter line, and inconveniently to the public. In such a case, the court would be justified in interposing under this act. But it appears here that abundance of accommodation is provided on the Midland line; and, though the distance travelled over is somewhat longer, no additional cost is incurred, nor any materially greater loss of time sustained by the public. And one very striking fact is, that the Great Northern Railway Company, the parties by far the most likely to be injuriously affected by it, so far from complaining, are satisfied with the arrangement existing, and appear by their counsel to oppose the rule. I think we must discharge the rule, with costs.

*436] *CRESSWELL, J.—I am entirely of the same opinion. The complainant has totally failed to make out anything like a case of want of reasonable accommodation. In considering what is a reasonable amount of accommodation, regard must be had to the convenience of the general traffic of the company. I am of opinion that the applicant has failed to make out a case of want of reasonable accommodation.

WILLIAMS, J.—I also think that we can only be justified in interfering where it is made out to our satisfaction that the public convenience requires it. The affidavit of the applicant shows very slender grounds for the rule: and the affidavits filed in opposition to the rule entirely remove all shadow of pretext for the motion. If the complainant had satisfied me that public convenience did really require that which he asks, and that the accommodation sought could reasonably be granted, I should have paused considerably before I assented to the rule being discharged. But this he has altogether failed to do.

Rule discharged, with costs.

*In the Matter of the Complaint of FREDERICK RANSOME and JOHN BRADLY GEARD against THE EASTERN COUNTIES RAILWAY COMPANY. *Jan.* 29.

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In dealing with the first branch of the 17 & 18 Vict. c. 31, s. 2, which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic, or subjecting any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage,—the fair interests of the company are to be taken into the account.

A railway company made an agreement with A. to carry for him a large quantity of coals during three years from Peterborough to various places on their lines of railway, at certain rates.

B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway; and the company charged him a much larger sum per ton in proportion to the distance over which his coals were carried, than they charged to A.,—the professed object of the difference being to enable A. (whose coal came to Peterborough by railway) to compete in the coal trade of the district with B., who had the advantage of having his coals brought to Ipswich by sea:—

Held, that this was giving an "undue preference" to A.

Quære, whether a railway company may not charge different rates, where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, and where one party provides his own wagons and the other uses those of the company? See In re Oxlade, post, p. 454.

T. JONES, in Trinity Term last, on behalf of Messrs. Ransome and Geard, obtained a rule calling upon the Eastern Counties Railway Company to show cause why a writ of injunction should not issue against them, enjoining them,—first, to desist from charging to the complainants for the carriage of coals on their railways called The Eastern Counties Railway, The Eastern Union Railway, and The Newmarket Railway, any greater sum per ton per mile than was charged by the said company to Messrs. E. & A. Prior & Co.,—secondly, to desist from charging to the complainants any greater sum per ton per mile for the carriage of coal on the said railways than they charged to persons with whom they had private agreements for the carriage of coals on the said railways,—thirdly, to desist from giving any undue preference or advantage to or in favour of Messrs. E. & A. Prior & Co., or any other person, for or in respect of the carriage of coals on the said railways: and why the company should not pay the costs of the application.

*The affidavit upon which the rule was obtained, stated, that the complainants were dealers in coals at Ipswich, Bury St. Edmunds, Thurston, and Elmeswell, in Suffolk, at Diss, in Norfolk, and at Mellis, Stowmarket, Needham Market, and Hadleigh, in Suffolk, and at Colchester, in Essex, and at other towns and places in the neighbourhood of those places: That the Eastern Counties Railway commences at London, and proceeds thence to Colchester, where it joins the Eastern Union Railway, which last-mentioned railway proceeds thence to Hadleigh, Ipswich, Needham Market, Stowmarket, Mellis, Diss, Elmeswell, Thurston, and Bury, where it joins the Newmarket Railway, which proceeds thence to Newmarket and Cambridge, where it joins another portion of the Eastern Counties Railway, and then proceeds to Ely and Peter-

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borough, where it joins the Great Northern Railway: That the Eastern Counties Railway Company have a lease for ninety-nine years of the Eastern Union and Newmarket railways, or have an agreement with those companies whereby the working and management of their railways is entirely under the control and direction of the Eastern Counties Railway Company, or the said Eastern Counties Railway Company have now by some other ways or means the possession of the said Eastern Union and Newmarket railways, or have the full power and control over or management of the traffic conveyed or carried on the said railways, or either of them; and the same are now generally designated and known, for the purposes of traffic, as the Eastern Counties Railways;(a) That the coal in which the complainants trade is principally derived from the collieries in Durham and Northumberland, and is brought from thence to Ipswich by sea; and the only mode in which the complainants *439] *are able thence to convey such coal to their customers in Hadleigh, Needham Market, Stowmarket, Elmeswell, Thurston, Bury, Mellis, and Diss, and such other neighbouring towns and places as aforesaid, is, by the Eastern Counties railway: That the Eastern Counties Railway Company make and give an undue and unreasonable preference or advantage to or in favour of particular persons or companies or merchants trading or trafficking on the said lines of railway in a similar description of goods to those in which the complainants trade; and the company subject the complainants and their goods or traffic to an undue and unreasonable prejudice or disadvantage in respect thereof: That the Eastern Counties Railway Company charged the complainants and other merchants dealing in coal, for toll for the conveyance or carriage of their coal on the said railways 2*d.* and 2½*d.* per ton per mile, and charge Prior & Co., who are coal merchants trading under the name or style of The Norfolk and Eastern Counties Coal Company, and who deal in coal at Colchester, Hadleigh, Needham Market, Stowmarket, Elmeswell, Thurston, Bury, Mellis, and Diss, and at other neighbouring towns and places, for toll for the conveyance or carriage on the said railways of the same description of coal produced from the said collieries, from ⅝ of a penny to ¾*d.* per ton per mile only: That the Eastern Counties Railway Company have entered into private contracts or agreements with particular persons or companies trading in coal on the said lines of railway, and particularly with Prior & Co., for the conveyance or carriage of the coals of such particular persons or companies on the said railways, at a less rate per ton per mile than the said company charge the complainants and other merchants who may not have such private agreements for the carriage of their coal on the same portions of the said railways: [The affidavit then proceeded to specify particular inequalities of charge, showing

(a) Worked under (amongst others) an agreement of the 6th of February, 1854, confirmed by an act of 17 & 18 Vict. c. ccxx.

that *the company charged the complainants the following rates of toll for carrying coals *from Ipswich* to the several places following,—to Bury St. Edmunds (27½ miles), 3*s.* 6*d.* per ton; to Thurston (23½ miles), 3*s.* 1*d.* per ton; to Elmeswell (19 miles), 2*s.* 10*d.* per ton; to Diss (27½ miles), 3*s.* 6*d.* per ton; to Mellis (24 miles), 3*s.* 1*d.* per ton; to Stowmarket (13½ miles), 2*s.* 7*d.* per ton; to Needham Market (9¾ miles), 1*s.* 10*d.* per ton; to Hadleigh (13 miles), 2*s.* 2*d.* per ton; to Colchester (18 miles), 2*s.* 11*d.* per ton:(*a*) and that they charged to Prior & Co. for the carriage of coals *from Peterborough* to the same places, at the following rates,—to Bury St. Edmunds (74 miles), 5*s.* per ton; to Thurston (78 miles), 5*s.* per ton; to Elmeswell (83 miles), 5*s.* per ton; to Diss (98 miles), 5*s.* per ton; to Mellis (95 miles), 5*s.* per ton; to Stowmarket (88 miles), 4*s.* 6*d.* per ton; to Needham Market (92 miles), 4*s.* 6*d.* per ton; to Hadleigh (113 miles), 4*s.* 8*d.* per ton; to Colchester (117 miles), 4*s.* per ton]:(*b*) That the said company in other respects made and gave undue preference or advantage to or in favour of the said Messrs. Prior & Co., or other persons with whom they had private agreements for the carriage of coals, and subjected the complainants and their said traffic in other respects to undue and unreasonable prejudice or disadvantage: And that, in consequence of the said railway company having given such undue and unreasonable preference or advantage to or in favour of such particular person or persons or company, and in *consequence of the said railway company having subjected the complainants and their said traffic to such undue and unreasonable prejudice and disadvantage as aforesaid, the complainants were much injured in their trade, and, in consequence thereof, had during the past two years suffered damage and loss therein to the extent of 1000*l.* and upwards. [*440 [*441

Bovill, Q. C., and *Sharp*, on a former day in this term, showed cause, upon an affidavit by the traffic manager of the Eastern Counties Railway Company, to the following effect:—That neither the said Eastern Counties Railway Company nor the Eastern Union Railway Company had any private agreement either with Prior & Co. or with any other person or persons, company or companies whatsoever, for the carriage of coal *from Ipswich* to any of the places aforesaid; but that the tolls mentioned in the complainant's affidavit were charged equally and after the same rate to all persons whatever; and that no reduction or increase in any such tolls had been made, either directly or indirectly, in favour of or against any particular company or person: That the coals conveyed *from Peterborough* to Thurston, Elmeswell, Mellis, Stowmarket,

(*a*) The affidavits filed in answer to the rule showed that this statement of the charges was somewhat inaccurate,—the real sums charged being respectively 3*s.* 2*d.*, 2*s.* 9*d.*, 2*s.* 6*d.*, 3*s.* 2*d.*, 2*s.* 9*d.*, 2*s.* 7*d.*, 1*s.* 6*d.*, 1*s.* 10*d.*, and 2*s.* 2*d.* per ton. But, in addition to these sums, there was a charge for haulage from the docks at Ipswich to the railway station, of 4*d.* per ton.

(*b*) The statement as to these charges was admitted to be accurate.

Needham Market, Hadleigh, and Colchester, were conveyed on the Eastern Counties railway from Peterborough to Ely and Cambridge, thence along the Newmarket railway to Bury St. Edmunds, and thence along the said Eastern Union railway to all the said before-mentioned places: That the coal conveyed by the Eastern Counties Railway Company from Peterborough to Bury St. Edmunds and the several places before mentioned, is produced principally from collieries situate in Derbyshire and Yorkshire, and is carried in large quantities, by the Great Northern and Midland railway companies respectively, to Peterborough: *442] and that such coal is much cheaper in *price at the pit's mouth than coal produced from the collieries in Northumberland and Durham: That all the coal of Prior & Co. carried by the Eastern Counties Railway Company has been and still is carried by the company in *wagons or trucks furnished by Prior & Co., or in wagons or trucks of the owners of the collieries from which the said coal is procured*, and not in the wagons or trucks of the company; and *which said wagons or trucks arrive at or are made up at Peterborough, and are despatched from Peterborough in entire trains*, and *depart at fixed times from Peterborough to the several places before mentioned;* and that the said coal, up to the 30th of June last, was carried from Peterborough to the places aforesaid under an agreement made in the year 1853 between the Eastern Counties Railway Company and Prior & Co., by which it was agreed that Prior & Co. should forward for conveyance along the said Eastern Counties railway, or should pay the company for the conveyance of, at least 240,000 tons of coal within three years after the making the said agreement, and that the tolls to be charged by the said company to Prior & Co., and which tolls had accordingly been so charged and paid by Prior & Co. for so carrying such coal, should be as follows, viz. [as stated in the complainants' affidavit]: That the said agreement with Prior & Co. expired on the 30th of June last; and that, within the stipulated period of three years, Prior & Co. did forward from Peterborough for conveyance along the said Eastern Counties railway coal in excess of the said 240,000 tons so agreed to be carried or paid for as aforesaid; and that the company had not contracted or bound themselves to carry coal at the tolls aforesaid *from Peterborough* aforesaid to any of the places aforesaid, or from or to any place or places whatever, solely or exclusively for Prior & Co.; but that the company merely agreed that they would not grant to any other *443] *person or persons or company or companies more favourable terms than those which they had agreed to with Prior & Co.; and that the Eastern Counties Railway Company had always been and still were ready and willing to enter into any arrangement with the complainants or any other person or persons or company or companies to carry coal upon the same or equivalent terms and conditions they so carry for Prior & Co.; and *that the carriage of coal at the reduced tolls aforesaid is beneficial and advantageous to the consumers of coal in Bury*

St. Edmunds, Thurston, Elmeswell, Diss, Mellis, Stowmarket, Needham Market, Hadleigh, and Colchester aforesaid, by extending the area of the supply of coal, and by bringing different descriptions of coal into the market in competition with the coal produced from the collieries in the counties of Northumberland and Durham, and in preventing a monopoly of the supply of coal for those places of the complainants and other coal merchants in Ipswich aforesaid: That, since the 30th of June last, the Eastern Counties Railway Company have carried, and do now carry, coals forwarded by Prior & Co. from Peterborough upon and over the line of their railway, to all the stations upon the lines worked by them, under the terms of a memorandum or agreement whereby the company have contracted, for a period of three years from the 1st of July last, upon terms similar in substance to the arrangement previously existing, but at tolls somewhat higher: That the tolls charged by the Eastern Counties Railway Company to Prior & Co. are fair and reasonable, having reference to *the large quantity they engage to forward or pay for, and to the fact that they* and not the company *supply the wagons or trucks for the purpose*, and that *the cost to the Eastern Counties Railway Company of the carriage of coal in entire trains is much smaller* per ton per mile *than when coals are forwarded in smaller *quantities and form only portions of entire trains:* That the coals of the com- [*444 plainants are sent by them to be, and have been and are, carried in wagons or trucks supplied by the company, and not in quantities sufficient to form entire trains, but form part of the ordinary goods trains: That, for the purpose of facilitating the traffic from Ipswich, the Eastern Counties Railway Company have at great expense constructed a tram-way from their station at Ipswich to the docks at Ipswich (at which said docks the coal so conveyed by sea from the collieries in Northumberland and Durham is landed), along which said tram-way the company convey the coal of the complainants and of other coal merchants of Ipswich from the said docks to the station for a toll of 4*d.* per ton, whereas the former cost of conveying the said coal from the docks to the station was 1*s.* per ton: And that the company have not charged, and do not charge, to any person or persons less than they have charged and still charge to the complainants for the conveyance of coals *from and to the same places;* and that *the company have not charged any person or persons less than they have charged the complainants for the conveyance of coals from the places from which the complainants have sent their coals;* and that, *if any should be sent from those places by Prior & Co., or by any other person, they would be charged at the same rate as the complainants;* and that the company have not given any undue preference or advantage to or in favour of Prior & Co., or any other person, for or in respect of the carriage of coals on the said railways, or either of them.

This is, in effect, a contest between two rival coal merchants. The first ground of complaint is, that the Eastern Counties Railway Com-

pany charge Ransome & Co. a larger sum per ton, in proportion to the
*445] distance over which their coals are carried, than they charge to *Prior & Co. The difference is justified by the circumstances: and there is no pretence for saying that any preference is given where the coals are carried in the *same direction*. The effect of an equal tonnage rate both ways would be to give Ransome & Co. a monopoly of the coal trade throughout the district in question,—confining it to sea-borne coals, to the exclusion of coals coming from Yorkshire and Staffordshire. The course, therefore, which is adopted by the company, is for the advantage of the public. [CRESSWELL, J.—I can very well understand that circumstances might exist to justify a higher charge for carriage one way than the other; for instance, the gradients might be such in one direction as to cause a much larger expenditure of power. But, nothing of that sort being shown, are you not by the inequality of charge subjecting a particular description of traffic to undue prejudice?] The object is, to enable the Yorkshire and Staffordshire coal to compete with the Northumberland and Durham, which have the advantage of a cheaper mode of conveyance to Ipswich. [CROWDER, J.—The object is, to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. [CRESSWELL, J.—Would it be justifiable in the company to carry cattle for a Norfolk farmer at a cheaper rate than for an Essex farmer, in order to enable the former to compete upon more equal terms with the latter in the London market?] It is submitted that it would.(*a*) [CRESSWELL, J.—The argument as to difference of direction does not apply as between Ipswich and Colchester.] True: but then a new state of things arises. The coals carried for Prior & Co. are carried over several lines of rail-
*446] way constructed *under the authority of different acts of parliament:(*b*) whereas, those carried for Ransome & Co. are carried only over the Eastern Union railway. Under the arrangement with Prior & Co., all their coals are brought from Peterborough, where they are made up into entire trains, in their own wagons, and start at fixed times, so that the company are enabled to convey them at less expense than they can for persons whose coals are brought at uncertain times and in quantities insufficient to form a train, and for whose use they provide the wagons or trucks. Besides, Prior & Co. were under covenant to send 240,000 tons within three years, or to pay for that quantity. The company are willing to carry for every one in entire trains, and at fixed times, at the same rate as they do for Prior & Co.

(*a*) This is hardly a fair criterion, seeing that rents and other expenses are in a great measure regulated by the more or less advantageous position of the land with respect to markets.

(*b*) See the 7 & 8 Vict. c. lxxxv., for making a railway from Colchester to Ipswich, the 8 & 9 Vict. cxcvii., for making a railway from the Eastern Union railway at Ipswich to Bury St. Edmunds, the 9 & 10 Vict. c. liii., for making a railway from the Eastern Union railway, in the parish of Bentley, to Hadleigh, and the 9 & 10 Vict. c. cclxxx., to amend "The Ipswich and Bury St. Edmunds Railway Act, 1845," and for making a railway from the Ipswich and Bury St. Edmunds Railway to Norwich.

[CROWDER, J.—But not from Ipswich to Peterborough.] They are willing to make the same arrangements with others as they make with Prior & Co. The difference of charge by reason of the difference of direction, is not incompatible with justice and equity. Freights from Newcastle to London, it is well known, are higher than for the back voyage from London to Newcastle. The tolls upon this railway are regulated by the 17 & 18 Vict. c. ccxxx., ss. 13, 16, an act which passed after the passing of the Railway and Canal Traffic Act, 1854, and which fully justifies all that is now complained of.(a) [CRESSWELL, J.—*The act of parliament referred to does not cast you loose from the obligations of the 17 & 18 Vict. c. 31.] [*447

Byles, Serjt., and *T. Jones*, in support of the rule.—This is a question of very grave importance to the ports of Ipswich, Colchester, and Maldon. Their trade in the article of coals will be utterly ruined, if the Eastern Counties Railway Company are permitted to charge these disproportioned and extortionate tolls. The 17 & 18 Vict. c. 31,—which is a most salutary act,—provides, in s. 2, that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, *or any particular description of traffic*, in any respect whatsoever; nor shall any such company subject any particular person or company, *or any particular description of traffic*, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Now, what was the position of these parties at the time of the passing of that act? Messrs. Ransome & Co. were able to bring coals from Northumberland and Durham to Ipswich by sea. Messrs. Prior & Co. brought their coals from Yorkshire and Staffordshire by means of the Great Northern and the Midland railways. The legislature has thought fit to leave each to the natural advantages of his position,—to the fair and legitimate competition between railway and sea carriage. The affidavits plainly show how the company have sought to frustrate this intention of the legislature, by diminishing their rate of carriage as they approach the sea. [CRESSWELL, J.—It is quite clear that the company have not charged equally in proportion to distance, but have diminished the rate to Messrs. Prior as the sea-borne coal comes in competition *with the inland coal. That raises the question.] [*448 It is said that there are circumstances which make a difference between the two cases. But there is nothing upon the face of the affidavits showing why the charge for carrying from east to west should not be the same as from west to east. And in several of the instances both are going in *the same direction*, and yet the inequality of charge remains. It is contended that the difference of charge is justified by the fact of Prior & Co.'s coals being made up into entire trains. But it does not appear upon the affidavits that the entire trains go

(a) The learned counsel prayed in aid the arguments urged in the case of In re Oxlade, which was heard on the preceding day. Vide post, p. 454.

through to Ipswich. On the contrary, it is sufficiently apparent that they drop some of the wagons as they proceed: and the probability is, that, as they advance, they subside into the ordinary goods trains, as Ransome & Co.'s coals do. [CRESSWELL, J.—Of what particular part of the statute is it that you complain of a violation? What is the precise grievance which you call upon us to redress?] The statute says that the company shall not make or give any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic. That imports all the provisions of the act regulating the railways in question: the companies are bound to charge an equal mileage rate to all. The company have given an undue and unreasonable preference and advantage to in favour of a particular description of traffic: they have given an undue preference to the traffic in coals from Peterborough over the traffic in coals from Ipswich. They have also given an undue and unreasonable preference and advantage to individuals over others carrying coals over the same portions of their railway. [CROWDER, J.—How do you make that out? CRESSWELL, J. —Suppose the same individual were to send coals from both places?] Possibly he could not complain. [CRESSWELL, J.—Why not?] If the act does not apply to such a case as this, it is hardly possible to conceive *449] a case to which any *ingenuity of construction could apply it. The court has power, under s. 3,(*a*) to call for further information, if it should be found necessary.

Bovill.—It is a common and understood practice on the part of railway companies to carry at reduced fares, where there is competition: for instance, the Great Western Railway Company, in order to compete with the South Western, carry passengers at this moment from London to Reading for 2*s.*; and yet the charge to Slough, which is a considerably less distance, is more than double that sum. Nobody has yet been ingenious enough to suggest that the Slough passengers have any cause of complaint.(*b*)

CRESSWELL, J.—This case raises questions of great importance, and of no little difficulty, and therefore we will take time to consider. One difficulty is this,—Suppose at Colchester there is a considerable traffic in coal, and also in lime or any other commodity which will not bear an equal amount of charge: say that coal could bear a charge of ¼*d.* per ton per mile, and lime only ½*d.*: could those engaged in the coal trade complain that the company charge them a higher rate for coal than they charge for the other commodity, and say that that is an undue and unreasonable preference in favour of a particular description of traffic? That is one of the many difficulties we have to encounter in endeavouring to put a construction upon this act. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.(*c*)

(*a*) See the section, antè, p. 411. This was done in Oxlade's Case, post, pp. 454, 477.
(*b*) See In re The Caterham Railway Company, antè, p. 410.
(*c*) The case was argued before Cresswell, J., and Crowder, J.

*This was a rule calling upon the Eastern Counties Railway Company to show cause why a writ of injunction should not [*450 issue against the company, enjoining them,—first, to desist from charging to the complainant for the conveyance of coals on their railways called the Eastern Counties Railway, the Eastern Union Railway, and the Newmarket Railway, any greater sum per ton per mile than is charged by the said company to Messrs. Edward & Alfred Prior & Co., —secondly, to desist from charging the complainant more than those with whom they had made private agreements,—thirdly, to desist from giving any undue preference or advantage to Messrs. Prior.

It appeared from the affidavits used by the respective parties, that Messrs. Prior had made an agreement with the company to send a large quantity of coals in three years from Peterborough to various places on the lines of railway mentioned in the rule, at certain rates to different places.

The applicants, coal merchants at Ipswich, sent coals which had been brought to that port by sea, to various places on the same lines of railway, and the company charged them a much larger sum per ton in proportion to the distance over which their coals were carried, than was charged to Messrs. Prior: and it was manifest that the sums charged to Messrs. Prior for the carriage of coals to different places, were fixed so as to enable them to compete in the coal trade with Ransome & Co., who had the advantage of having their coals brought by sea to Ipswich.

The question which we have to determine on this rule, depends upon the construction to be put upon the 17 & 18 Vict. c. 31, s. 2, by which it is enacted that no railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of *traffic; nor [*451 shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The first thing to be ascertained, is, the meaning of the expressions "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage." Are those words to be construed with reference to the interests of the parties using the railway only? or, may the interests of the railway owners be taken in any manner into consideration? Ex. gr., if one thousand tons can be carried for a lower sum per mile than one hundred tons, yielding an equal profit per ton to the railway company, may they so regulate the charge as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference? Or, if goods can be carried one hundred miles at a lower rate than ten, and yield an equal profit per ton per mile, may the company charge less per mile for those carried one hundred miles, without giving an undue or unreasonable preference? If that *may* be done without giving what the statute calls an undue or un-

reasonable preference, may not the company, in fixing the rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their line, and longer distances, agree to make a reduction in such case? It is true that the sender of smaller quantities for a shorter distance will pay more per mile and more per ton in the respective cases; but, will that be an undue or unreasonable prejudice or disadvantage?

Again, if two railways start from the same terminus, and arrive at the same terminus, by different routes, must they charge for the whole line at the same rate as from intermediate stations to either terminus? Ex. gr., there are two lines from Portsmouth to London,—the London and
*452] South Western, viâ Bishopstoke and *Winchester, and the London, Brighton, and South Coast, by Brighton: must they charge as much *per mile* for passengers and goods from Portsmouth to London, as from Winchester or Brighton to London? or, may they carry at a lower rate the whole distance, in order to compete with each other, without being subjected to the charge of imposing on the Winchester or Brighton traffic an undue or unreasonable disadvantage?

After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account; and then the questions above suggested assume a very complicated and difficult character, and are such as we feel but little qualified to decide. Nevertheless, as the legislature has thought fit to impose on the judges of this court the duty of dealing with such questions, we must do so to the best of our abilities, whenever it becomes necessary.

The present case is, in our judgment, free from these difficulties, because the difference between the rates charged to Messrs. Prior and to Messrs. Ransome is not founded on such considerations as have been suggested, but manifestly on the intention to enable Messrs. Prior, who deal in coals brought inland to Peterborough, to compete with Ransome and Co., dealing in coals sea-borne to Ipswich. No such advantage is due to them: it is, therefore, an undue advantage; and without deciding that a railway company may not charge different rates where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, we think that some order must be made to prohibit the continuance of the practice now existing on the railway in question.

We cannot say that both parties should be charged the same sum per ton per mile; for, Messrs. Prior find their own trucks, and Messrs. Ran-
*453] some use the trucks of *the company; and it is possible that it may cost the company more to carry over some parts of the line than others. We cannot, therefore, prescribe an equal mileage rate independent of the allowance for trucks.

And, for the same reason, we cannot make absolute the second branch

of the rule, and enjoin the company to desist from charging Ransome & Co. any greater sum per ton per mile for the carriage of coals on their railways, than they charge to persons with whom they have private agreements.

But we think that a writ should issue enjoining them to desist from giving an undue preference to Messrs. Prior, and to carry coals for Ransome & Co. on equal terms with Messrs. Prior; having due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other. And, as the scale of charges hitherto made for carrying coals for Ransome & Co. manifestly imposed on them an undue and unreasonable disadvantage, the railway company must pay the costs of the application and rule. Rule accordingly.(*a*)

(*a*) The rule was drawn up as follows: "It is ordered that a writ of injunction do issue against the said Eastern Counties Railway Company, pursuant to the Railway and Canal Traffic Act, 1854, enjoining the company to desist from giving an undue preference to Messrs. Prior for or in respect of the carriage of coals on the said railway, and enjoining the said company to carry coals for the said complainants on equal terms with the said Messrs. Prior, having due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other; and that the said company do pay to the said complainants, or to their attorneys, their costs of the application," &c.

*In the Matter of the Complaint of WILLIAM OXLADE *v.* THE NORTH EASTERN RAILWAY CO. *Jan.* 30. [*454

Upon a motion for an injunction against a railway company under the 17 & 18 Vict. c. 31, enjoining them,—"*first*, to carry upon their railway for the complainant such coal and coke as might be offered to them by him for that purpose,—*secondly*, to charge for the carriage thereof respectively tolls *not higher* than the tolls charged by them for carrying coal and coke to persons for whom the same coal and coke were also carried on another railway forming a continuous line with theirs, and tolls not higher than the tolls charged by them to persons with whom they had private agreements for the carriage of coal or coke,—*thirdly*, to provide for the complainant depots for depositing and receiving his coal and coke on the stations of the railway similar to those provided at such stations for persons with whom they had private agreements for the carriage of coals along their railway, and similar to those provided at such stations for persons who consigned their coal and coke to the company,—*fourthly*, to afford to the complainant the same facilities for the receiving, forwarding, and delivery of his coals and coke upon and from the railway, as the company afforded to persons who consigned their coal or coke to the company,—*fifthly*, to provide for the complainant wagons, carriages, and trucks for the conveyance and carriage of his coal and coke, and forwarding the same upon the railway,—*sixthly*, to afford to the complainant all reasonable and proper facilities and accommodations for the unloading of his coals and coke at the various stations of the railway and to afford to the complainant at the said stations the same facilities and accommodations for the unloading of his coals and coke as the company afforded to colliery owners or lessees of collieries, or to any other person,"—on cause being shown, it was referred to one of the masters to inquire and report upon the following questions:—

"*First*, whether any, and what, accommodation and facilities were provided or afforded at any, and what, stations on the line of the railway for the unloading of coal and coke, and for what persons and under what circumstances,—*secondly*, whether the company carried coals or coke for persons other than the complainant on any, and what, terms different from the terms on which the company had carried, or had offered to carry, coals and coke for the complainant,—*thirdly*, whether there was any, and what, difference between the circumstances under which the company had so carried coals and coke for such other persons, and the circumstances under which the company had carried, or had offered to carry, coals and coke for the complainant,—

fourthly, whether, and in what manner, and how, the company were enabled by reason of such difference of circumstances so to carry coals and coke for such other persons at a cost to the company less than the cost to the company of carrying coals and coke for the complainant."

Upon the first point, the master reported as to the accommodation afforded by the company for unloading coals and coke at the different stations, that they ascertained as nearly as possible the consumption in the neighbourhood of each station, and the sort of coal required, and entered into terms with collieries having the particular description of coal, to supply the required quantity; that they appointed a depot agent to manage the sale of the coals so supplied, through whom the orders were transmitted to the colliery, and who accounted to the colliery owners for the proceeds; that all the depots were allotted to such agent; that all coal dealers were treated alike; and that this course was adopted by the company for the purpose of preventing any obstruction of the general traffic of the railway:—

Held,—disposing of the fourth and sixth branches of the rule,—that this was not giving an undue or unreasonable preference or advantage to or in favour of any particular person or company, or subjecting any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage.

Upon the second point, the master found that the company charged for *through rates* ¾*d.* per ton per mile for coal and coke going south, unless their wagons were used, in which case they charged one eighth of a penny per ton per mile more for the first 100 miles, and one sixteenth for any distance beyond, and 3*s.* per day for demurrage on every wagon detained more than four days off the line; that there was no variation made in the charge to any one, except in the case of coals carried by the North Eastern Railway Company in conjunction with the Great Northern Railway Company through from the collieries to London, the North Eastern Railway Company's haulage ceasing at York, where their railway joined the Great Northern; such coal being made up into full trains, and the wagons for the entire distance being provided by the Great Northern Railway Company, for which the charge was ¼*d.* per ton per mile for the whole distance,—the circumstances of the coals so carried being carried in entire trains, and at regular times, and without stoppages, enabling the company to carry them at such lower rate:—

Held, that it was sufficiently made out that the circumstances stated enabled the company to carry such coals at a cost less to them than the cost of carrying coals and coke for the complainant, and that by carrying them, under the circumstances stated, at such lower rate, no undue or unreasonable preference was given, or any undue and unreasonable disadvantage imposed.

The master also found that a similar arrangement was made with the Midland Railway Company, but not under the same circumstances, the inducement on the part of the company being a *desire to introduce the northern coke into Staffordshire*:—Held, that lowering their rates *for that purpose* was giving an undue preference to that particular traffic,—there being no special circumstances affecting the pecuniary interests of the company to justify the course pursued.

As to the fifth branch of the rule (which was not referred to the master), viz. the complainant's demand to have wagons or trucks provided by the company for the carriage of his coal and coke:—Held, that the company were justified in refusing to furnish them, by the complainant's refusal to pay demurrage for the detention of the wagons beyond the time allowed by the regulations of the company.

Held also, that the company could not be called upon to carry coals to the extremity of their line (where it joined the Midland railway), and there shift them into other trucks or wagons, they having no convenience at that place for that purpose, and not affording such facility to any other person.

And, as to the first branch of the rule,—Held, that the company were not common carriers of coal.

And, the complainant having asked by the rule more than he was entitled to, and the company having been partially in the wrong, the court refused to allow costs to either.

T. JONES, in Michaelmas Term, 1855, on behalf of William Oxlade, obtained a rule calling upon The North Eastern Railway Company to show
*455] cause "why a writ of *injunction should not issue against them, enjoining them,—first, to carry upon their said railway for the said William Oxlade such coal and coke as may be offered to them by the said William Oxlade for that purpose,—secondly, to charge for the carriage thereof respectively tolls not higher than the tolls charged by the com-

pany for carrying coal and coke respectively to persons for whom the same coal and coke respectively are also carried on the Great Northern railway, and tolls not higher than the tolls charged by the said company to persons with whom the said company have private agreements for the carriage of coal or coke,—thirdly, to provide for the said William Oxlade depots for depositing and receiving his *coal and coke, on the stations of the said railway, similar to those provided at such stations for persons [*456 with whom they have private agreements for the carriage of coals along the said railway, and similar to those provided at such stations for persons who consign their coal and coke to the said company,—fourthly, to afford to the said William Oxlade the same facilities for the receiving and forwarding and delivery of his coals and coke upon and from the said railway, as the said company afford to persons who consign their coal or coke to the said company,—fifthly, to provide for the said William Oxlade wagons, carriages, and trucks for the conveyance and carriage of his coal and coke, and for forwarding the same upon the said railway: and why the said North Eastern Railway Company should not pay to the said William Oxlade, or to his attorney, his costs of and occasioned by this application."

The affidavits upon which the rule was founded, stated that the complainant was a coal dealer trading in coal principally produced from the West Belmont and other collieries in Durham, and in coke from the same county: That the only mode in which he could bring his coal and coke to York, where he principally carried on his trade, was, by conveyance on the North Eastern Railway as far as York (which was a continuous line of railway from Durham to York), and thence to Normanton by the said line of railway, where such railway joins the Midland railway, upon which they were carried to the other places where he traded: That the North Eastern Railway Company did not afford reasonable facilities for receiving and forwarding the complainant's coal and coke upon and from their line, but made and gave an undue and unreasonable preference and advantage to and in favour of particular persons or merchants trafficking on their line in a similar description of goods, and subjected the complainant and his goods or traffic to an undue and unreasonable prejudice or disadvantage in respect thereof: That the said *North Eastern Railway Company charged the complainant toll for the carriage of his coal and coke on their railway 1*d.* per [*457 ton per mile and upwards, and charged merchants who trade on the Great Northern railway (which adjoins the North Eastern railway at Knottingley, in the county of York) for toll for the carriage of coal and coke over the *same portion* of the railway, and under *like circumstances*, ½*d.* per ton per mile only: That the said North Eastern Railway Company, also, to the best of the deponent's knowledge and belief, had entered into private contracts or agreements with certain particular persons trading in coal or coke on their said line of railway, for the carriage of coal or coke at a less rate per ton per mile than they charged

the complainant or other merchants who might not have such private agreements with the company for the carriage of the same description of goods on the same portions of their line of railway: That the said North Eastern Railway Company refused to provide for the complainant, as a coke and coal merchant, depots for depositing or for receiving his coal and coke at the different stations on their line, in like manner that they did for those merchants who had a private agreement with the company: That the said company, by themselves or by their agents, made arrangements or agreements with certain coal and coke merchants or owners, to consign all the coal and coke belonging to them to the company, or their agents, at a certain fixed price, or otherwise; and the company would not provide depots at their stations on their said line of railway for receiving the coal and coke belonging to the complainant and other merchants who traded on their line of railway, and who declined to consign coal and coke to the said company or their agents, in the same manner or on the same terms as they provided depots for the coal and coke of those coal and coke merchants or owners who consigned their coal and coke to the *company or to their agents at a fixed price or otherwise, and would not and did not afford to the complainant and such other coal and coke merchants as aforesaid the same facilities for the receiving and forwarding and delivering of their goods and traffic upon and from their said line of railway, as the company afforded to such coal and coke merchants or owners who consigned their coal and coke or traffic to the company or their agents as aforesaid, but subjected the complainant and such other merchants as aforesaid, and his and their coal and coke and traffic, to an undue and unreasonable prejudice and disadvantage in respect thereof, and in respect of the receiving and forwarding and delivering of his and their said coal and coke and traffic upon and from their said line of railway: That the said North Eastern Railway Company would not provide and refused to provide the complainant (being a merchant trading on the Midland line of railway as well as on their own line of railway, and not having entered into any private agreement with the said company, and declining to consign his coal and coke to them or to their agents) with wagons or carriages or trucks for the conveyance or carriage of his said coal and coke, or for forwarding the same upon their said line of railway; and the said North Eastern Railway Company refused to receive, convey, carry, forward, or deliver for the complainant (being such merchant as last aforesaid) his said coal and coke upon and from their said line of railway, and, in consequence thereof, he was unable properly to carry on his said trade, or to supply his customers with coal and coke. [The affidavits then set out certain correspondence between the complainant and his solicitors with certain agents of the company, relative to the alleged causes of complaint.]

*458]

Byles, Serjt., and *J. Addison*, in Hilary Term, 1856, showed cause,

upon the affidavits of the general traffic *manager and the secretary and general manager of the company. The former [*459 was in substance as follows:—The North Eastern railway comprises the main line of railway, which, leaving the North British railway, with which it is united, at Berwick, passes through the counties of Northumberland and Durham, and is there continued forward direct to York, from whence it proceeds southwards, and, dividing into two main lines at a station called Burton Salmon, joins the Midland railway in the parish of Altofts, in the county of York, about one mile north of Normanton, and the Lancashire and Yorkshire railway at or near Knottingley, in the said county, which last-mentioned railway extends about ten miles further southwards from Knottingley to a place called Askern, where it unites with the Great Northern railway. There are numerous branch railways in each of the said counties of Northumberland and Durham and York which form part of the North Eastern railway, and many of those which are in Durham have been constructed principally in order to afford to the owners or lessees of many of the collieries or coal-pits and coke-ovens which have been sunk or erected in that county, the means of transit by railway for their coals and coke, either to the said main line of railway, and thence to the places of consumption, or to the places of shipment of such coals and coke on the east coast. Some of the said branch railways communicate directly with collieries or coke-ovens situate upon or immediately adjoining them, and in other instances the means of access to the collieries or coke-ovens from such branch railways is by other public lines of railway, or by private branch railways or tramways constructed for that purpose by the owners or lessees of particular collieries or coke-ovens. The North-Eastern Railway Company have also constructed at many of the stations along their railway, but not at all of them, coal depots or cells, as places of *deposit for the coals which might probably be required by the [*460 district or locality where or near where such depots have been built. Such depots consist of separate cells, which are necessarily of limited and varying number and size, depending mainly upon the situation and probable estimated wants of the neighbourhood, and are so constructed as that the coal wagons may be readily pushed or hauled along a short siding or branch line passing over them; and the particular class or description of coal to which each cell is appropriated is then shot down from the bottom of the wagon containing it into its proper cell; after which, the empty wagon is returned to be re-loaded. The North Eastern Railway Company do not deal in or sell, and never have, either by themselves or by their agents or servants, directly or indirectly dealt in or sold, on their own account, coals at any of their stations or depots; neither do they require or have they required or made agreements or arrangements with any coal or coke-owners to consign all or any of the coal and coke belonging to any such owners, to them (the

company) or their agents, at a certain or at any fixed price; but, on the contrary, the company have wholly abstained from any such conduct. The North Eastern Railway Company having only such limited and varying number of coal depots or cells as aforesaid at their respective stations, have from time to time appropriated such cells to or for such of the different particular sorts or qualities of coal brought on to their railway as seemed most needed by, or best suited to the wants of, each particular locality or place, and have let such cells accordingly to the owners or lessees of the collieries or coal-mines producing such respective descriptions of coal, as a place for the deposit thereof, and from whence the same may, as required by the public, be loaded and removed. Except at York, Hull, and Selby, at which places the de-
*461] mand for coal is *extensive, the North Eastern Railway Company do not allow any of the colliery owners occupying a cell or cells at any of their stations to have a separate agent or agents at any such station for the sale of their coal; and, at the stations at York, Hull, and Selby, the company allow only a limited number of persons to act as agents for all the owners or lessees of collieries sending coal for sale thereat. These arrangements and restrictions are necessary, partly in consequence of the limited demand for coal at the smaller stations, and at them and the stations at York, Hull, and Selby also in consequence of the great inconvenience which would result from having several agents, whose interests would be necessarily conflicting, at such places, and the necessity on the part of the company of keeping their coal depots, and the yards within which the same are placed, in proper order, and under proper control, and free from confusion and disturbance; with which objects, the said company appoint at each such smaller station some *one* person on whom they can rely as the general agent for each and all of such colliery owners using the coal-cells thereat; by which agent each and all of the public are supplied with whatever quantity they may require of any of the particular qualities of coal brought to such station, at such price as the owner of the colliery producing the same may from time to time fix and direct to be demanded; each and all of such owners being at full liberty to fix, and in no way whatever restricted or prevented by the said company from fixing, such price for his coals as he thinks proper, and employing or having whatever number of persons or agents he or they may think proper for the sale of his or their coals elsewhere than at the said depots, and either in the immediate neighbourhood thereof or in or through the districts into which his coals may be brought or sent for sale. The several
*462] agents so appointed by the company *do not sell any of the said coals for or on behalf of such company, or as the agents thereof, but only on behalf of and as the agents for the respective owners of the several collieries the coals from which are brought to each such station for sale; and each of such agents accounts directly to each of such

owners for whatever quantity of his coals may have been sold by such agent, and sends orders to the proper officer of the company for further supplies thereof from time to time when and as required, in order to keep up a constant supply to meet the demand for each quality of coal, which orders are thereupon transmitted to the respective collieries to which the same relate, the proceeds being remitted by such agent direct to the colliery owners entitled thereto, or to their agents. The North Eastern Railway Company are not, and never have been, common carriers of coals or coke, but have always refused, and still refuse, to become such, or to undertake the carriage thereof as common carriers, or otherwise than under terms or arrangements to be from time to time entered into by them with each particular owner or lessee of a colliery or coal-pit and coke-ovens adjoining their railway, or with which the same communicates as aforesaid, and with each railway or other company or person who may be desirous of having coals transmitted thereby; but, occasionally, purchasers of coals in considerable or specified quantities have been accommodated by having a certain quantity of coal conveyed specially for them: such practice has, however, been found to be productive of much inconvenience, and detention of wagons, and has therefore been discontinued. Many of the colliery owners provide their own wagons, particularly such as are used for the transit of coals for shipment; but the company have also a stock of wagons of their own, and particularly of those which are used for transit upon their main line of railway: *They also provide locomotive *power for hauling the same.* Other railway companies with whose railways the railway of the North Eastern Railway Company communicates either directly or by means of intermediate lines, also provide wagons for the carriage of coals and coke to the districts through which such railways pass; and such wagons, if properly constructed, are allowed to pass over and along the North Eastern railway directly to the collieries and coke-ovens. The supply or number of coal and coke wagons belonging to the North Eastern Railway Company is necessarily limited, the cost of providing the same being very considerable, and the said company not being common carriers of such articles, and declining to become such, and only providing wagons to such extent as they think prudent. *The coal wagons of the North Eastern Railway Company are principally employed upon their own lines in conveying for the owners or lessees of the different collieries aforesaid the coals required for the supply of the depots at the various stations upon the same.* A large number of the company's coke-wagons are employed in conveying the coke required by them for the consumption of their own engines; and the remainder of such coal and coke-wagons are from time to time employed in carrying coals or coke for the owners or lessees of the collieries or coke-ovens aforesaid, or for other railway companies, or occasionally for private individuals or companies, to particu- [*463

lar localities, or are sometimes specially hired for given periods by particular individuals for their own trade, and appropriated and marked accordingly. *Some of such coke-wagons were also at one time employed in carrying coke consigned to the order of Oxlade.* The North Eastern Railway Company have fixed general rates of charge for the carriage of coal and coke upon their railway from all the collieries and coke-ovens upon or adjoining their railway, and terms as to the use of *their *464] wagons and depots, which general rates and terms are well known and apply to all owners and lessees of collieries and coke-ovens alike; and, if any party refuses to accede to or act up to such rates or terms, the company thereupon decline to carry any further quantity of his coal or coke in their wagons. It, however, constantly happens that the owners or lessees of a particular colliery or coke-ovens, or a particular railway company, are desirous of having their coals or coke carried at rates below the ordinary and general rates; in all of which cases the carriage of such coals or coke by the North Eastern Railway Company, and the supply of wagons for the same, if not provided by the colliery owners, is always the subject of a special contract or arrangement with each particular owner or lessee of a colliery or coke-ovens, or railway company, or the respective agents for the same; in which contracts or arrangements the North Eastern Railway Company invariably require, as the ground and inducement of their accepting such lower rates, that such special contracts or arrangements shall extend over a given period, and be so made as to insure the transmission of the coals or coke (the carriage of which is so specially contracted for below the general rates) with *regularity of despatch and arrival*, and the *punctual return of their wagons* from the respective places of their destination *within a given number of days;* the regular passage of such traffic over their railway in order to avoid interference with the general passenger and merchandise traffic thereon, and the constant employment of their wagons without loss of time by detention, being essential ingredients of each such special contract or arrangement, the non-adoption of which, or the omission to carry out the same, would prevent the proper and efficient working and management of the railway, particularly as a public main line of railway between the other great systems or main lines of public *railway to the north and south thereof. The applicant, Oxlade, *465] was formerly a station-master in the employ of the North Eastern Railway Company (then called The York, Newcastle, and Berwick Railway Company); and, after leaving them, he acted as, and represented himself to be, the agent for different collieries, and particularly for the West Belmont Colliery, and in that capacity he applied for and used a periodical ticket or pass over the said company's railway, upon the same terms as those issued to other agents for collieries, which passes are issued by the company at a certain modified or lower rate of charge than to ordinary persons, because the parties to whom they are granted are

acting as agents for the collieries transmitting their coal by the said company's railways. Large numbers of wagons for the carriage of coals and coke are supplied by the Great Northern Railway Company, and are sent by them over the North Eastern Railway Company's railway for such purpose by, and hauled along the same to York by, the engines of the Great Northern Railway Company; from which place such wagons are hauled along the line of the North Eastern Railway Company by their engines to the colliery where they have to be laden, if it be upon or adjoining such line, or otherwise, if such colliery be not on or adjoining such line, such wagons are so conveyed to some convenient place for standing near such line until they are removed to the colliery for the purpose of being loaded and thence returned to the North Eastern railway. By the North Eastern Railway Company's Act, 1854, the company are authorized to charge, for the use of the railway, for all coals, coke, culm, and cinders conveyed thereon, tolls varying according to the distance such articles are carried thereon, viz.

"If 30 miles or upwards, per ton per mile . . . 1*d.*

"If 20 miles, and less than 30, per ton per mile . . 1½*d.*

"If less than 20 miles, per ton per mile . . . 1¾*d.*"

*But, for all such articles conveyed for a greater distance than 40 miles, *in wagons not belonging to the company*, and *consigned to any place south of York*, the company are restrained from charging more than ¾*d.* per ton per mile. All the said charges include the toll for the use of carriages and of engines on the said railway: and, in case any person employs his own wagons (except for the aforesaid articles conveyed as aforesaid south of York), the company are required to make him an allowance equal to the sum for the time being allowed by or according to the railway clearing-house regulations to one company for the use by another company of the like wagons belonging to such first company employed for a similar purpose. The North Eastern Railway Company are also authorized by their said act to charge a reasonable sum for loading, unloading, collecting, receiving, or delivering, and for providing covers for minerals, goods, articles, or animals. [*466

The affidavit of the secretary and general manager, besides going over the details already given in the former affidavit, set out a resolution, dated May 26th, 1854, by which the company agreed, in answer to an application on the part of the owners of the West Belmont Colliery, to the following effect,—"that, assuming the wagons are provided by the Great Northern Company, the companies (*a*) will agree to convey 1000 tons per week for one year, at the rate of ½*d.* per ton per mile; the companies, however, retaining the right to increase the rate to ⅝ of a penny per ton per mile during the months of November, December, January, and February next, should such an advance be made generally to other coal-owners." It further stated as follows:—The North

(*a*) The companies now incorporated by the name of the North Eastern Railway Company.

*467] Eastern Railway Company are not common carriers of *coals or coke, and decline to undertake the carriage thereof by their engines and wagons, or the haulage thereof by their engines along their railway, except under special arrangements and conditions; and, in case the wagons of the said company are allowed to be sent beyond their own railway, they make a charge against the parties for whom the same are so sent, by way of and as demurrage, in the event of the detention of any of such wagons after a regular given time. Such charge for demurrage is a well known and recognised charge, and one which is made by all railway companies in similar circumstances, and is necessary to insure the prompt return of the wagons sent, inasmuch as the company in such case part with the temporary control over such wagons, and, without such charge being made, would have no sufficient security for the return of their wagons within a reasonable time, and for the loss of hire or use thereof during such detention, and the consequent injury to their business and engagements. There is no merchant who trades on the Great Northern railway for whom the North Eastern Railway Company carry coal or coke over their railway, unless an owner or lessee of a colliery or coke-ovens be so called: and all colliery owners, or other persons, if any, for whom coals or coke are so carried over the same portion of the North Eastern railway, and under like circumstances, are all charged tolls equally and at the same rate per ton per mile. The company charge the same rate of toll to every owner or lessee of a colliery or coke-ovens for the carriage of coal or coke to the same station or place on their own railway, and have never charged less than 1*d.* per ton per mile for any coal or coke carried on their railway, unless the same has been for shipment or for manufacturers on the rivers Tyne or Wear, or for some place south of York; in which excepted cases, a less rate has been charged, if the company *468] has not supplied the *wagons, or the length of lead upon their railway, or the inferior quality or description of the coal or coke so conveyed, has rendered some less charge necessary, in order to allow of such coals or coke being carried at all; or if there have been other special circumstances in the particular case rendering a less rate than that necessary and fair. The company have not entered into any contract or agreement with any person trading or trafficking in coal or coke on their railway, for the conveyance or carriage of any such coal or coke on their railway at a less rate per ton per mile than they charge to any other person for the conveyance or carriage of the same description of goods on the same portion of their railway, and under like circumstances. The company have not provided, and do not profess to provide, depots for receiving the coal or coke of all persons who may think fit to start in and carry on business as coal merchants, and be desirous of trading and trafficking in those articles on their railway; and they deny their liability so to do: but the company have afforded

and do afford to Oxlade and all other persons, whether coal and coke merchants or not, the same facilities for the receiving and forwarding and delivering of his and their goods and traffic upon and from their said line of railway, as they afford to all other parties under similar circumstances; and the company have not subjected Oxlade and his coal or coke or other traffic to any prejudice or disadvantage in respect thereof, or in respect of the receiving, forwarding, or delivery of his coal or coke or other traffic upon or from their railway. The North Eastern Railway Company do not provide wagons, carriages, or trucks for the conveyance of coal or coke upon the Midland or any other railway beyond their own line of railway, except upon the special understanding or rule, that, in case any such wagons, carriages, or trucks are not returned to them within a given number of days which are allowed for the *journey and for unloading and the return thereof, demurrage shall be paid for every day any of the same are detained beyond [*469 such given number of days. Mr. Oxlade refused to abide by such rule, and therefore the company declined to allow any of their wagons, trucks, or carriages to go beyond their railway with coals or coke for him, or to be laden for such purpose,—of all which the company gave him timely notice, and stated that such his refusal was the cause of their so declining. The North Eastern Railway Company have not standage ground, or any place for wagons to remain, at or near the point of junction of their railway with the Midland railway, which is on a considerable embankment in the parish of Altofts, in the county of York, at the distance of about one mile northwards of Normanton, and therefore they cannot and do not allow any of their wagons, carriages, or trucks to be deposited at or near the point of such junction, for the purpose of being unloaded, and such coals or coke loaded into other wagons, carriages, or trucks to be brought there by any other company or person, or for any other purpose; neither is there room or accommodation for such other wagons, carriages, or trucks to be placed and remain for the purpose of being loaded with such coals or coke at or near such point of junction; and therefore the North Eastern Railway Company have since such refusal of Oxlade as aforesaid declined to allow any of their wagons, carriages, or trucks laden with coke or coal for him, and addressed for him or to his order, at some place south of and beyond their railway, to go or be taken beyond York, the company having no convenient place south of York where to allow their wagons, carriages, or trucks so laden as aforesaid to stand or be unloaded. The said North Eastern Railway Company have never refused to receive, convey, and carry, forward, and deliver for Oxlade any coals or coke desired by him to be so conveyed and *carried in wagons, carriages, or trucks properly constructed and supplied by him [*470 for such purpose: but the said company decline to allow their own wagons to be so used by or for him, because of his refusal to comply

with the rules of the company as to the payment of demurrage for the detention of their wagons, carriages, or trucks, and because, as regards any of such coals or coke which may have been consigned to Oxlade at any station on their railway, the company have not standage ground at their stations whereat to allow wagons, carriages, or trucks to stand until unloaded, or cells or depots wherein to deposit coals or coke for any and every merchant or person who may think fit to order the same.

There were also four other affidavits by the general manager of the company, verifying a long series of correspondence in reference to the disputes between the complainant and the company.

The substance of the complaint,—which is of the most vague description possible,—is, that the Eastern Counties Railway Company have given undue preference in the carriage of coals and coke to other persons, and have subjected the complainant to undue and unreasonable prejudice. In order to make out a case against the company, it should have been shown distinctly that they have refused to carry coals or coke for the complainant *on their own railway* upon the same terms as they carry for others, and under what circumstances such refusal took place. [CRESSWELL, J.—It is suggested that the company carry cheaper to one line than to another.] The complaint in effect is, that the company give a preference to the great coal-owners and to the Great Northern Railway Company. There is nothing, however, in the affidavits on which the rule was founded to bear that out: and the affidavits in answer distinctly deny it. To warrant the complaint, it *471] should be shown that the *complainant was proposing to travel over the same portion of the railway, and *under similar circumstances* with those whose goods are said to have been carried at a lower rate. The amount of tolls which the company are authorized to take for the use of their railways, by the 17 & 18 Vict. c. ccxi., s. 32, is as follows:—"For all coals, coke, culm, and cinders which shall be conveyed for a distance of 30 miles and upwards, per ton per mile, 1*d.*: for the like articles, goods, and things which shall be conveyed for 20 miles, but for a less distance than 30 miles, per ton per mile, 1½*d.*: for the like articles, goods, and things which shall be conveyed for a less distance than 20 miles, per ton per mile, 1¾*d.*: for the like articles, goods, and things which shall be conveyed for a less distance than 40 miles, and shall be intended for shipment, per ton per mile, 1½*d.*: Provided always, that, for all coals, coke, culm, and cinders which shall be conveyed for a greater distance than 40 miles *in wagons not belonging to the company*, and *consigned to any place or places south of the city of York*, it shall not be lawful for the company to demand or receive any greater sum than ¾*d.* per ton per mile." And the 35th section provides, "that, in case any person shall employ his own wagons or trucks for the carriage or conveyance of goods, animals, or minerals

on the said railways (other than for coals, coke, culm, and cinders conveyed as aforesaid for places south of York), then and in every such case the company shall and they are hereby required to make an abatement or allowance to such person from the tolls hereinbefore authorized to be received for such goods, animals, or minerals, equal in amount to the sum which shall for the time being be allowed by or according to the railway clearing-house regulations to one company for the use by another company of the like wagons or trucks belonging to such first company employed for a similar purpose." [CRESSWELL, J.—The 35th section does not apply to coals at all.] The *90th section of the 8 & 9 Vict. c. 20, reciting that "it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties," enacts that "it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." And by the interpretation clause, s. 8, it is enacted that the word "toll" shall include any rate or charge or other payment payable under the special act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway. One specific ground for complaint is, that the North Eastern Railway Company charge Mr. Oxlade toll for the carriage of his coal and coke on their railway 1*d.* per ton per mile and upwards, and charge merchants who trade on the Great Northern railway for the carriage of coal and coke *over the same portion of the railway and under like circumstances*, ½*d.* per ton per mile only. The answer to that is, that the charge there complained *of is made under different circumstances. The lower rate is charged to persons who provide their own wagons, and who traverse the whole line, providing their own locomotive power beyond. Further, it is said the company deal on more favourable terms with persons who have private agreements with them. The affidavits in answer show the nature of these private agreements,—the persons with

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whom the company so contract being under an engagement to send 1000 tons per week, and at stated periods. Are the company bound to afford the same facilities to one who sends but a single wagon-load at a time, that they do to one who sends the larger quantities? [CRESSWELL, J.—That is a question not free from difficulty; for, if a large dealer is to have his coals carried at a lower rate than a small one, he will be enabled to monopolize all the trade. It may be, however, that the company are enabled to carry at a lower rate in the one case than in the other, by reason of the difference of cost.] Of necessity, where the supply is so regulated as to enable the company to send forward an entire train for one merchant at regular stated intervals, the company gains by the convenience of the arrangement more than any equivalent for the reduced charge. The act says that the company shall not give *undue* or *unreasonable* preference. The onus of showing that it is an *undue* and *unreasonable* preference is cast upon the complainant. Besides, it must be borne in mind that the company are not common carriers of coal and coke: Palmer *v.* The Grand Junction Railway Company, 4 M. & W. 749;† Johnson *v.* The Midland Railway Company, 4 Exch. 367.† Then it is insisted that the company are bound to find depots for the use of the complainant. To find that sort of accommodation at every station on the line for every person who chooses to ask for it, would obviously be impracticable. [CRESSWELL, J.—Mr. Oxlade does not complain that there is any depot the use of which would be *applicable to him, and which the company re-
*474] fuse to allow him the use of: but simply that they refuse to find him depots.] The capabilities of the company to afford such accommodation must necessarily be very limited; and they are clearly justified in allotting the few depots they have to those persons who send coals and coke in large and regular quantities. The suggestion that the company receive consignments of coals and coke for sale, is answered by the affidavits. Then, as to the last branch of the rule, the answer is, that the company are not bound to furnish wagons or trucks at all. [JERVIS, C. J.—The 34th section of the 17 & 18 Vict. c. ccxi., which provides "that (except as in the act otherwise provided) the said tolls shall include the toll for the use of carriages and of engines for propelling the carriages on the said railways, and that no further charge than is thereinbefore stated shall be made by the company for the use of such carriages and engines," supposes that the carriages shall be supplied by the company.] Not *beyond* their line.

Bovill, Q. C., and *T. Jones*, in support of the rule.—Early in the history of railways, there had been disputes between the companies and persons for whom they carried goods; and the importance of the subject,—inasmuch as the railways were rapidly becoming the only means of transit,—attracted the attention of the legislature; and attempts were made to secure equality of charge. This was done by the 90th

section of the 8 & 9 Vict. c. 20, which provided that all tolls "should be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances;* and no reduction or advance in any such tolls shall be *made, either directly or [*475
indirectly, in favour of or against any particular company or person travelling upon or using the railway." That gave a loophole to the companies: and the facility with which a variation could be effected in the circumstances soon rendered the provision a dead letter. This being the state of things, and it being found that the railways had monopolized all the carrying trade of the country, the legislature, with a view to the just interests of the public, and after it had been found by experience that the former provisions were not sufficiently stringent, passed the statute now under consideration. The act, in s. 2, begins with providing that "every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic *upon and from* the several railways belonging to or worked by such companies." Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, shows that acts of this description, which are passed for the benefit of the public, are to be so construed as best to attain that object. The object of this act was, to deal with railways and canals as great public highways. It provides that "no such company shall make or give any undue or unreasonable *preference* or *advantage* to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable *prejudice* or *disadvantage* in any respect whatsoever." The complaints made on the part of Mr. Oxlade are, that the company refuse to carry coal and coke for him upon the same terms as they carry for other persons; that they refuse to carry for him to the point of junction of their railway with the Midland railway, or to allow their wagons to convey his coal and coke on the Midland railway; and that they *refuse to provide [*476
him the same accommodation for unloading at the various stations at which he wants to unload, as they provide for others. The general as well as the special act contemplates that the company shall provide carriages as well as engines: 8 & 9 Vict. c. 20, ss. 86, 90, 118, 119; 17 & 18 Vict. c. ccxi., ss. 32, 34, 35. By their affidavits, the company's officers admit that they make a distinction between Mr. Oxlade and persons with whom they contract for the carriage of large quantities of coal. The effect of this preference is, entirely to destroy the trade of the smaller dealer,—the very thing the legislature intended

to guard against. The language of this act is far more stringent than that of the acts of parliament upon which the cases of Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399,†(*a*) and Edwards *v.* The Great Western Railway Company, 11 C. B. 588 (E. C. L. R. vol. 73)(*b*) turned. [CROWDER, J.—What effect do you give to the words "undue or unreasonable," in the 17 & 18 Vict. c. 31, s. 2?] It is submitted that it is giving an undue and unreasonable preference to charge less to the large dealer than to the complainant. Then, as to the depots, it is as essential that there should be a convenient place for unloading coals, as that accommodation should be provided for landing passengers. Is it not an undue preference to provide that sort of accommodation for some and to exclude others? [JERVIS, C. J.—It seems that there is *no* place provided for unloading except the cells or depots, which are allotted exclusively to certain colliery owners?] Precisely so: and this is a substantial ground of complaint. [CRESSWELL, J.—That opens out a very wide field of inquiry, and one that is of vital importance to railway companies. JERVIS, C. J.—If the company carry coal to a particular station, surely they must provide the means *of unloading it. WILLIAMS, J.—Neither the rule, nor the affidavits, suggest a total absence of places for unloading.] The court may mould the rule, and direct an inquiry. The company have no right to refuse to carry Mr. Oxlade's coal to the extremity of their own line,—to Altofts. [CRESSWELL, J.—They say they have no means of unloading at the junction at Altofts; and they refuse to carry on Oxlade's coal to places beyond their own line, because Oxlade refuses to pay demurrage.] The dispute as to demurrage was a matter between the Midland Railway Company and the North Eastern Railway Company. Crouch *v.* The London and North Western Railway Company, 14 C. B. 255 (E. C. L. R. vol. 78), is an authority to show that the company's liability as carriers is not limited by the extent of their own railway.

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Cur. adv. vult.

JERVIS, C. J.—We have considered this case a little; and we think, that, from the form of the rule, there is one point which the company have not had an opportunity of answering. We therefore think that the rule should be amended in that respect, and that the matter should be referred to one of the masters to inquire,—"First, whether any and what accommodation and facilities are provided or afforded at any and what stations on the line of the said company's railway for the unloading of coal and coke, and for what persons and under what circumstances, —Secondly, whether the said company carry coal and coke for persons other than the said William Oxlade on any and what terms different from the terms on which the said company have carried or have offered to carry coals and coke for the said William Oxlade,—Thirdly, whether there is any and what difference between the circumstances under which

(*a*) 8 Vict. c. xlix., s. 26. (*b*) 7 & 8 Vict. c. lii., s. 50.

the said company have so carried coals and coke for such other persons, and the circumstances under which the said company have carried or have offered to carry coals and *coke for the said William Oxlade, [*478
—Fourthly, whether and in what manner and how the company are enabled by reason of such difference of circumstances so to carry such coals and coke for such other persons at a cost to the said company less than the cost to the said company of carrying coals and coke for the said William Oxlade;" the master to report thereon to the court forthwith, and to be at liberty to examine the parties to be produced before on him, on oath, to be administered by him.

The rule was accordingly amended by adding the following:— "Sixthly, to afford to the said William Oxlade all reasonable and proper facilities and accommodation for the unloading of his coals and coke at the various stations of the said railway, and to afford to the said William Oxlade at the said stations the same facilities and accommodations for the unloading of his coals and coke as the said company afford to colliery owners or lessees of collieries, or to any other person.'

In Hilary Term last, the master, having heard a vast deal of evidence as well on the part of the complainant as of the company, reported to the court as follows:—

This was an application for an injunction against the North Eastern Railway Company, under the 17 & 18 Vict. c. 31, "An act for the better regulation of the traffic on railways and canals," and, upon the hearing, the court, by a rule of the 31st of January last, referred it to me to inquire into four questions, and to report thereon to the court.

The inquiry has been a very protracted one; and a great quantity of irrelevant matter was brought forward. I have endeavoured to extract such parts of the evidence as bear upon the inquiry: and the result appears to me to be as follows:—

On the first point, viz. as to accommodation afforded *for [*479
unloading coals and coke at the different stations, there is the uncontradicted evidence of Mr. Sheriffe, the general manager of traffic, that, as far as the public are concerned, there is ample accommodation at all the stations for the unloading of coal and coke, and that there are no complaints of a want of supply. There are one hundred and twenty-four collieries in Durham and Northumberland, fifty-six of which send most of the two sorts of coals to the south; and thirty-one collieries in Yorkshire. As it would be utterly impossible to find accommodation for so many to send coals, and would lead to no beneficial result, but only produce a glut in the market, and materially interfere with the general traffic of the railway, the plan the company adopt for carrying on the coal and coke(*a*) trade is this,—they ascertain as near as possible the amount of population in the neighbourhood of each station, and calculate the consumption of coal at two tons a year for each individual, and

(*a*) [Carrying.]

build cells or depots accordingly. They then find out what kind of coal is most in request at the several stations, and enter into terms with those collieries which furnish the particular coal, to supply the required quantity. They appoint a depot agent, whose duty it is to manage the sale of coals: and, whenever any particular coal is getting low, he sends an order to the general agent at Darlington, who sends up the required number of wagons to the particular colliery, where they are filled, and returned in due course. By this means, the depot agent knows when he may expect the wagons, and makes arrangement for their immediate unloading; and thus all confusion is avoided, and all interference with or risk to the general traffic prevented. This is a universal rule; and, though instances have occurred in which parties have departed from it, the practice has always been stopped when it has been discovered. Mr. Sheriffe says, "the order must go through the depot *agent. I *480] apprehend this is a principle which cannot be departed from without injuring the traffic of the line, and hazarding the public safety:" and, as a proof of the utility of the rule, he mentions a case where Mr. Oxlade, as agent for the West Belmont Colliery, got more coals sent to the Slingsby Station than the station-master, who acted there as the depot agent, had ordered, and they had to be unloaded on the main line. Mr. Sheriffe goes on to say, "The matter was reported to me, and I stopped the practice: I could not have continued the responsibility, for all the coals in Durham. The traffic could not have been carried on without restriction. The incidents at this station convinced the directors that the only way of doing business was, through depot agents."

It was proved, however, that most of the Yorkshire coal-owners employ their own agents. This was their practice before the amalgamation of the companies, in 1854; and they have continued it: and Mr. Sheriffe says, that, though it does interfere in some degree with the traffic, yet, as all their coals come to York, and the station there is large, and at head quarters, and under the immediate eye of the managers, all hazard to the public is prevented.

Mr. Sheriffe says,—"We do not know private coal merchants. We have only carried coals for Mr. Oxlade as the agent for the West Belmont Colliery, or some other colliery. We only treat with coal owners and their agents." He was asked if they (the company) had not appropriated some cells at York to private coal merchants. He says, —"We have not appropriated any cells to private coal merchants. They (the coals) are sold to the public by the depot agent: the public are satisfied. All coal merchants are treated as the public, and may get what coals they please, by sending a proper order. The agent acts for the collieries. He simply sells whatever coal is asked for. It makes *481] no difference to the *railway company. He renders the account to the colliery owners." He was also asked if one or two private individuals had not occasionally had a wagon down unknown to the agent.

He says he has no doubt it has been done; but it is in every case an exception to the rule, and is stopped if discovered.

At Thirsk Town station, it appears that there are seven cells for coal, and two for lime, which are all let to one person: and it was endeavoured to be shown that he was a private coal merchant. But Mr. Sheriffe says,—"We only knew him as agent to the coal-owners; and all his orders went through the general agent of the company."

At Malton station there are twenty cells; and also some private sidings belonging to Lord Fitzwilliam. By arrangement between the company and him, he carries coal for himself. The cells are let to different colliery owners, at 5*l.* or 6*l.* a year. The coal merchants here make an agreement with some colliery owner, that they may come and take what coal they like, and render an account to the owner. They can get any quantity they think fit from any of the collieries having cells at the depots. Mr. Oxlade might do the same. But here also all the orders must go through the agent: and Mr. Oxlade refused to conform to the rule.

Mr. Oxlade, in reply, says,—"I know Mr. Walker, of Bridlington. I have seen the depots he occupies. There is a board up with these words: 'Walker, Lime and Coal Merchant.' I obtained an invoice from him; it was, 'Bought of J. Walker, Lime and Coal Merchant.' In 1854, I had dealings with him. I sold him coals. The invoice was in my own name. I fixed the price with him. The coals were sent from different collieries. I ordered them at the different collieries. At Thirsk there was one Kirby, with whom I dealt under the same circumstances; and at Hull. I sent the orders direct to *the collieries. I did not send for the coals through the company's agent. I only ordered the wagons through the agent. I should say, order wagons to be sent up to particular collieries." [*482

It would appear that, in these instances, the agent at Darlington knew the number of wagons ordered: and Mr. Sheriffe says, in reply,—"We only know these parties as agents for the collieries. They sell coals for the coal-owners, and are allowed 4*d.* to 9*d.* a ton for their profit, according to agreement." In fact, there appears to be one principle throughout, by which the company are governed, viz. to provide an ample supply of coals for the public, and to prevent by their rules any obstruction of the general traffic of the railway.

On the remaining points referred to me, there is the following evidence:—Mr. Quelch, the mineral manager for the northern district of the North Eastern Railway, says:—"The quoting of rates from the collieries in Durham, is in my management. The local rates, or rates to places on our own line, differ from the through rates. As a general principle, for the through rates, or rates off our own line, if carried in other wagons than the North Eastern Railway's wagons, the rate is ¼*d.* per ton per mile for coal and coke going south. If they have our wag-

ons, there is an additional charge of $\frac{1}{8}$ of a penny per ton per mile for the first hundred miles, and $\frac{1}{16}$ for any distance beyond, with demurrage for the wagons, of 3*s.* per day per wagon, if detained beyond the time allowed, that is, four days after they leave our line. This is quoted to all persons, and acted on, except when a special agreement is made (as hereinafter mentioned). The act authorizes us to charge 1*d.* a mile per ton including wagon-hire; but we have never charged the full amount for through traffic. The local rates are on a graduated scale, regulated by distance, universally applicable and universally applied." He then goes into a *statement of the rates charged for local traffic: but, as they are universal, and applied equally to every one without exception, it is unnecessary further to allude to them.

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Mr. Sheriffe's evidence on these points is as follows:—"The rates, as regards local stations and stations off our line, are different. I am not aware that we ever carried for Oxlade. We knew him only as agent for collieries, and never debited him for rates. We debited the coal-owners always for rates. There is no difference in terms to any one. The coals that are carried a longer distance on our line are charged a lower rate than for a shorter distance. On the 24th of July, 1854, Oxlade applied by letter for a rate per ton per mile for small coal in train loads. In reply, we quoted the same rate to him as to others, viz. $\frac{3}{4}$ of a penny, the lowest rate the company charges. As to places off the line, there is one uniform rate of $\frac{3}{4}d.$ per ton per mile to every one. But we carry coals in connexion with the Great Northern railway at $\frac{1}{2}d.$ per ton from the colliery to London. The Great Northern find the wagons for the entire distance. Our haulage ceases at York; and we take our proportion of the rate. One of the principal reasons for taking it at so low a charge, is, that it is taken *in full train loads*, and *very large quantities*. Another reason is, that it must be taken at a low rate, or not at all. The rate is taken as *a through rate to London. The fact of full train loads brings great advantages.* We can run between York and the sidings where the Great Northern coals are deposited, with almost as much regularity as with passenger trains. There are no stoppages and no shunting; and the engines are fully and uniformly loaded. Regularity is of the greatest consequence. Our object is, to get as much work out of an engine as we can: and it is apparent that an engine going forty or sixty miles without stopping, can do it in less time than an engine which is always stopping. *When the quantities are smaller, and sent indiscriminately *from several collieries, we have to stop at all the places, and have to marshal the wagons accordingly.* Constant stopping and shunting increases the expense, by the detention of the engine, and also from the fact, that, whenever an engine has to shunt, it stops any other engine coming up. *The fundamental consideration is, the amount an engine can earn by the number of miles it goes.* That forms an element in the calculation of the profits

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of the company. The amount of work we get out of the wagons, is also a consideration. When they go off the line, we charge for the hire of them ½ of a penny per ton for the first hundred miles, and $\frac{1}{16}$ afterwards. We allow four days: and, if detained beyond that time, we take demurrage alike from all parties,—3s. a wagon per day. We do not consider that this pays us, as we have only a certain number of wagons; and, if they are unduly detained, the loss is greater than the price of demurrage."

"A trade is carried on with the Midland railway; but not under the same circumstances. *A desire to introduce northern coke into Staffordshire made us do it*, in conjunction with the Midland Counties Railway. It is carried at ½*d.* per ton per mile, exclusive of wagon hire, in large quantities."

These are the special agreements before alluded to:—

The first is with one Barrat, who is agent for Robson, a coal-owner in Durham. It is dated the 24th of October, 1855, and is as follows: "Thomas Barrat, as agent for John Robson, and the owners of Byers Green, Hunwich, and Newfield collieries, hereby agrees to send over the North Eastern railway, from Ferry Hill to Altofts, in twelve months commencing 1st November, 1855, and ending 1st November, 1856, 30,000 tons of coke manufactured from coals wrought out of Byers Green, Hunwich, and Newfield collieries; such coke to be sent south of Derby, and to be used only for manufacturing purposes and blast furnaces. The coke to *be sent in equal or as nearly as may be equal monthly quantities; and satisfactory evidence to be produced from time to time by the owners of the said collieries, of the places at which the coke is delivered, and the purposes for which it has been used, should such evidence be required by the North Eastern company,—in consideration of the North Eastern Railway Company have agreed to convey the said quantity of 30,000 tons of coke over their railway from Ferry Hill to Altofts at the rate of ½*d.* per ton per mile; such rate being exclusive of the charge for wagons, in case the said North Eastern railway provide any for this purpose. Payment of each month's dues to be made at the usual times, that is to say, on the 20th of the following month. And it is expressly agreed by the said Thomas Barrat, for John Robson and the owners of the above-named collieries, that, in case the stipulated quantity of 30,000 tons of coke be not sent within the period of twelve months commencing the 1st November, 1855, and ending 1st November, 1856, the said North Eastern Railway Company shall be entitled to charge an additional rate of ½*d.* per ton per mile on such portion of the 30,000 tons of coke as may have been sent; and that the said John Robson and the owners of the aforesaid collieries will pay to the North Eastern Railway Company the said additional rate." [*485

Another agreement was with Mr. Pease; and the minutes of the meeting of the directors at York at which the terms were stated, is as

follows:—"Minutes of meeting held at York on Tuesday, July 24th, 1856. Present Mr. Sheriffe, Mr. Clark, Mr. Brown. Mr. Sheriffe stated that the North Eastern Railway Company were willing to agree to the following arrangements with Mr. Pease, for the carriage of coke from Darlington to the South Staffordshire district and places beyond Derby; the minimum quantity to be conveyed upon the after-mentioned
*486] conditions to be 20,000 tons per annum. The rate to be *½d. per ton per mile to Normanton. The coke not to be used for locomotive purposes. If any portion of it is found to be so used, the parties to pay 1d. per ton per mile for its conveyance over the North Eastern Railway. Any quality of coke to be sent, so long as it is strictly confined to iron manufacture. Coals to be conveyed on the same terms. As respects wagons, the North Eastern Railway Company to supply at the ordinary charge as much of their own stock as may be found convenient, in the event of Mr. Clare's (the agent's) wagons being found insufficient. The company to have the use of Mr. Clare's wagons to load back to York, or stations north of York, at 6d. per ton. The wagons to be sent to any stations where such loading turns up. The wagons when loaded to be under clearing-house rules. Salt in return coke wagons to the alkali works in the Newcastle district, to be carried for the next three months at ½d. per ton per mile. Arrangement to date back from the 1st June, 1855."

"The third agreement is with a person of the name of Sparkes, for carrying 15,000 tons per annum. He first offered 10,000, which I refused. I named 15,000 as the lowest amount we could carry at ½d. per mile." His agreement was for three years; and it appears that for the first two years he did not send the specified quantity, and was charged ½d. per ton per mile, as every one else, and was only allowed the drawback on the last year, when he did send the specified quantity."

These were the only special agreements the company had: and they charge every one else the universal rate of ½d. per ton per mile.

Mr. Sheriffe continued,—"We have carried coke for Oxlade on the Midland line: I think, from East Hetton. It was carried at the usual charge of ½d. per ton. They were not full train loads. He was in the habit of detaining our wagons at a place called Great Bridge, in
*487] *Staffordshire, and refused to pay demurrage." This led to a correspondence between the South Staffordshire railway and the North Eastern; in which the former refused to receive any more wagons of coke consigned to Oxlade: and, in consequence, Mr. Sheriffe, on the part of the North Eastern Railway Company, gave him notice, by letter of the 25th of September, 1854, that they must cease to send any more wagons for him to the collieries. A letter from the South Staffordshire railway of the 16th of October, 1854, addressed to Mr. Sheriffe, is as follows:—

"Oxlade's coke.

"Dear sir,—In reference to our former correspondence, this man, by his letter of the 14th, advises us,—'Yours of the 12th instant to hand; and, to save further trouble respecting the demurrage, please note I will not pay any demurrage to any railway company.' We have a declaration from him, dated 10th, for trucks 1054, 323, 3211, 544, and 3262; so that your people are very evidently still letting him have wagons for here. I need only refer you to our previous correspondence. "T. C. MARSHALL."

Mr. Sheriffe further says, that the whole cause of Mr. Oxlade's trade in coke being stopped, was, his refusal to pay demurrage; that, if any one else had refused to pay demurrage, the company would have refused to carry for him; and that the parties hiring the wagons are liable for the demurrage.

Mr. Oxlade says,—"My reason for refusing to pay demurrage, was, that I had no control over the account: and, if I were to agree to it, it would ruin me, as they might charge me what they pleased and when they pleased. No demurrage occurred through my neglect. I know the wagons were detained at Great Bridge; but it was by the South Staffordshire railway. I have no doubt they have been detained, loaded and unloaded, many days. When the company refused to let their *wagons go off their line, I applied to them, by letter of the 6th November, 1854, to let their wagons take the coke to the [*488 end of their line, and I would provide other wagons to carry it on; but they gave me no answer. I have applied personally; but they would only do it their own way."

He further says,—"I have refused to pay the wagon hire, because it is not mentioned in the act. I refuse to pay the $\frac{1}{8}$ of a penny, in addition to $\frac{1}{4}d.$ per ton, on the North Eastern railway. It is less than the legal charge; but I object to its being divided. I object to pay $\frac{1}{4}d.$ per ton per mile, when other people pay $\frac{1}{2}d.$ *I know the $\frac{1}{2}d.$ is only charged to persons having their own wagons.* I have a dispute with the South Staffordshire. In 1854, I know that parties were underselling me at Great Bridge, both in coal and coke; and elsewhere on the Midland line. I told the North Eastern railway people of it, and they said they could not explain it; they had no advantage."

This evidence appears to me to be all that relates to the questions referred to me, viz. whether the company carry coals and coke for persons other than the said William Oxlade, on any and what terms different from the terms on which the said company have carried, or have offered to carry, coal and coke for the said William Oxlade,—secondly, whether there is any, and what, difference between the circumstances under which the said company have so carried coal and coke for such other persons, and the circumstances under which the said company have carried, or offered to carry, coals and coke for the

said William Oxlade,—and, lastly, whether and in what manner and how the said company are enabled by reason of such difference of circumstances, so to carry such coals and coke for such other persons at a cost to the said company less than the cost of carrying coals and coke for
*489] the said William Oxlade. And it evidently appears, from *this uncontradicted evidence, that, with the exception of the three agreements mentioned, there is one universal rate of carriage charged to every one, both on the local stations and on the through traffic, and is quoted alike to every one who applies for it.

The Master's report having been read, a discussion took place as to which side should begin; and, in the result, the court decided that the counsel for the company should be considered as showing cause, the report of the Master being treated as substituted for the materials upon which the motion was founded, and the argument being limited to the matters referred to the Master.

Byles, Serjt., and *J. Addison*, for the company.—All that the statute 17 & 18 Vict. c. 31, s. 2, prohibits, is, the giving *undue* or *unreasonable* preference or advantage to or in favour of any particular person or company, or any particular description of traffic, or the subjecting any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage. The statute which defines the duties of the company as to the imposition of tolls,—8 & 9 Vict. c. 20, s. 90,—provides that all such tolls "shall be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances*." Of the matters referred to the Master, all are disposed of by his report, except that which relates to the special agreements. It would be manifestly impossible for the company to provide depots for every coal merchant who might choose to carry coals on
*490] their line. *And if the complainant were allowed to unload his coals at every station as and when he pleases, the entire traffic of the line would be stopped. The company are not, and do not profess to be, common carriers of coals: Johnson *v.* The Midland Railway Company, 4 Exch. 367.† The Master's report shows that they do even more for the accommodation of the public than they are bound to do. The complaint of excessive charges made to Mr. Oxlade, as compared with the charges made to the Great Northern Coal Company, is disposed of by the Master's report. All, therefore, that remains to be considered, is, that part of the rule which refers to the special agreements. These were for the carriage of coals and coke from the collieries and coke-ovens in large quantities and at stated periods. The company might, therefore, well be enabled to carry for those persons on terms somewhat more favourable, without being guilty of any breach of the duty imposed upon

them by the statute; and their so doing was clearly not giving a preference or advantage that could be considered as undue or unreasonable. In every trade it is the universal practice to make a difference in favour of one who deals largely. Upon this principle it is that return tickets and family tickets are issued by nearly all the railway companies. As to the company's refusal to permit their wagons to go beyond the limits of their line with Oxlade's coals, two answers may be given: in the first place, they are not bound to travel out of their line; and, in the next place, their refusal was warranted by the conduct of Oxlade himself, who refused to pay the amount of demurrage for the detention of the wagons which was uniformly charged to all. The refusal to carry to Altofts is justified by the absence of accommodation at the place (which is a mere junction) for unloading. Upon the whole it is submitted that there is nothing in the Master's report *to sustain any part of the charge [*491 which has been made against the company.

Bovill (with whom was *T. Jones*), contrà.—The very object of the recent act was, to discourage monopolies. Various contentions having arisen between railway companies and persons for whom they carried, and the provisions of the special acts not having been found sufficiently stringent,—see Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399;† Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, and 11 C. B. 545 (E. C. L. R. vol. 82), and Edwards *v.* The Great Western Railway Company, 11 C. B. 588,—equality of charge was sought to be enforced by the 90th section of the 8 & 9 Vict. c. 20.(*a*) It was very soon found that this provision was inefficient to cure the evil; and that led to the passing of the 17 & 18 Vict. c. 31. The company are clearly guilty of an infraction of the provisions of that statute, if they give any undue or unreasonable preference or advantage to, or impose any undue or unreasonable prejudice or disadvantage upon, any particular person. That the company are common carriers of coals on their lines of railway, is clear from the cases of Palmer *v.* The Great Western Railway Company, 4 M. & W. 749,† and Johnson *v.* The Midland Railway Company, 4 Exch. 367.† Indeed, this case would not have been referred to the Master, unless the court had been satisfied that they are so. And Crouch *v.* The Great Northern Railway Company, 14 C. B. 255 (E. C. L. R. vol. 78), shows that they are even bound to carry *beyond* their own lines. As to the first point referred to the Master, it appears, that, although ample accommodation and facilities are afforded at every station for the unloading of coal and coke for certain persons to whom *the company choose to give a preference, none whatever are afforded to [*492 Mr. Oxlade. He is altogether precluded from obtaining coals by means of their railway. The only answer they give, is, that it is more convenient to them that he should buy his coals of their depot agent. Is that

(*a*) Antè, p. 472.

to be tolerated? Then, as to the second point,—the terms of carriage,—the Master finds, that, with respect to the coals and coke carried by the North Eastern Railway Company in conjunction with the Great Northern, there is a saving of time and expense to the company which justifies the diminished charge. That Mr. Oxlade cannot fairly except to. But the case stands upon a totally different footing with regard to the three private agreements referred to. There is no difference between one colliery owner or coke merchant and another to justify this different treatment. [*Addison.*—The North Eastern Railway Company carry coals for no one off their own line. CRESSWELL, J.—Or contract to do so? *Addison.*—No.] The charge they make, is, for carriage of the coals and coke to the end of their line, and for the use of wagons beyond. With Mr. Pease,—one of the persons with whom they have a private agreement,—they agree to carry to Normanton, which is some thirty miles off their line. [*Byles*, Serjt.—The company have running powers to Normanton.] The Master finds that the company charge to these three persons for the carriage of coke and coals to South Staffordshire, 2*s.* a ton less than they charge Mr. Oxlade; and for this he finds no justification whatever. The excuse now set up is, that these contracts or agreements are made with colliery owners. But coke is a manufactured article: and colliery owners stand in no different position as to that than any other person. The carriers' cases already referred to show that the trade of the customer makes no difference. Then, it is said that, in these three instances, the contracts are for the *493] *conveyance of large quantities at regular times. To allow this argument to prevail would be to give effect to a monopoly of the large dealers. The courts have always repudiated the notion that carriers have any right to make a distinction in respect of quantity. In the case suggested of return tickets and family tickets, there is no preference given; all who choose to avail themselves of the regulation, are treated alike. With regard to the loading back, there is nothing in the report to show that there is any advantage to the company corresponding with the difference of charge. [CRESSWELL, J.—I observe that all the agreements are for the carriage of coals and coke over the whole of the North Eastern line and beyond it.] The company refuse to carry for Mr. Oxlade to the end of their line: they refuse to carry his coals and coke to Altofts. [CRESSWELL, J.—Nor is it reasonable that they should, under the circumstances stated in the report.] At all events, they are bound to carry on to Normanton, instead of stopping, as they do, at York, which is thirty miles short of it. The agreement with Barrat is, to carry from Ferry Hill to Altofts. The 2d section of the 17 & 18 Vict. c. 31, enacts that every railway company having or *working* railways which form a continuous line of railway communication, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways, by the other, without

any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf. [CRESSWELL, J.—That part of the section which applies to the traffic as a continuous line refers to the company which is to carry *on. CROWDER, J.—Does it appear that the company have accommodation for unloading at Al- [*494 tofts?] They do not say they have not. [CROWDER, J.—It is for you to show a reasonable ground of complaint.] It is submitted that ground enough has been shown to induce the court to make this rule absolute. [CRESSWELL, J.—What is it that you ask us to order the company to do? When we are asked to order something to be done at the peril of an attachment for non-compliance with our order, I think it should be presented to us in precise terms.] Mr. Oxlade is entitled to have his rule absolute upon all the three points which have been made. [CROWDER, J.—Your argument materially qualifies what you ask by the rule.]

Byles, Serjt., proposed to reply.

CRESSWELL, J.—You have already been heard upon the Master's report. We do not think there should be a reply.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was a rule obtained by Mr. Oxlade, calling upon the North Eastern Railway Company to show cause why a writ of injunction should not issue against them, under the 17 & 18 Vict. c. 31, enjoining them to do various things: [His Lordship read the rule, as amended.]

When cause was shown against the rule, before the late Lord Chief Justice and my Brothers Crowder and Williams and myself, it was referred to the Master to inquire into four questions, and report thereupon to the court.

The questions so referred to the Master were,—first, whether any, and what, accommodation and facilities *are provided or afforded [*495 at any, and what, stations on the line of the said railway for the unloading of coal and coke, and for what persons, and under what circumstances,—secondly, whether the company carry coals or coke for persons other than the said William Oxlade on any, and what, terms different from the terms on which the said company have carried, or have offered to carry, coals and coke for the said William Oxlade,—thirdly, whether there is any, and what, difference between the circumstances under which the said company have so carried coals and coke for such other persons, and the circumstances under which the said company have carried, or have offered to carry, coals and coke for the said William Oxlade,—and, fourthly, whether, and in what manner, and how, the said company are enabled by reason of such difference of circumstances

so to carry coals and coke for such other persons at a cost to the said company less than the cost to the said company of carrying coals and coke for the said William Oxlade.

The report was made on the 21st of January, when my Brother Crowder and I were the only judges present,—a circumstance which we much regret, considering the novelty and difficulty of the matter which we are called upon to decide. Those matters were fully and ably discussed before us by counsel; and we have endeavoured to ascertain what we ought to do, in order to give effect to the statute on which the rule was founded.

The Master's report upon the first question was as follows—[His Lordship read it.]

This being the principle by which the company have been governed, we do not find, that, by the regulations made for carrying it into effect, —and which are fully detailed in the Master's report,—any undue or unreasonable preference or advantage has been given to or in favour of any particular person or company; nor has any particular person or company, or any particular *description of traffic, been subjected to any undue or unreasonable prejudice or disadvantage.

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This disposes of the fourth and last branches of Mr. Oxlade's rule, viz. those which call upon the company "to afford to the said William Oxlade the same facilities for the receiving and forwarding and delivery of his coals and coke upon and from the said railway, as the said company afford to persons who consign their coal or coke to the said company," and "to afford to the said William Oxlade all reasonable and proper facilities and accommodations for the unloading of his coals and coke at the various stations of the said company, and to afford to the said William Oxlade at the said stations the same facilities and accommodations for the unloading of his coals and coke, as the said company afford to colliery owners, or lessees of collieries, or to any other person."

The Master then states the circumstances relating to the carriage of coals by the North Eastern Company, which are conveyed forward from York on the Great Northern line, by that company: and we think that it is made out that such circumstances enable the company to carry such coals at a cost to them less than the cost of carrying coals and coke for Mr. Oxlade; and that it is not shown, that, by carrying them at a lower rate, any undue or unreasonable preference is given, or any undue or unreasonable disadvantage imposed.

This disposes of so much of the second branch of the rule as relates to carrying coals for persons for whom the same are also carried on the Great Northern railway.

The Master then proceeds to report upon the other part of that branch of the rule, viz. the charge made by the company for coals carried for persons with whom they have private agreements for the car-

riage of coals and coke. It appears that "a desire to introduce the northern coke into Staffordshire" induced the company to make three special agreements with different parties *for the carriage of coal and coke at a rate lower than their ordinary charge. We think [*497 that the desire to introduce the northern coke into Staffordshire was not a legitimate ground for making such agreements. Lowering their rates *for that purpose* was giving an undue preference to that traffic. Other special circumstances are stated in the agreements, which, had they affected the pecuniary interests of the company, might have furnished ground for contending that the preference was not undue or unreasonable: but the Master has not found or stated that there was before him any evidence to show that the pecuniary interests of the company were affected.

Upon this state of facts, we are of opinion that such agreements could not be made after the passing of the 17 & 18 Vict. c. 31, without violating its provisions. Two out of the three agreements were made after the act passed; one of them before: but all have now expired. It would, therefore, be futile to enjoin the company to charge Mr. Oxlade for carrying coals tolls not higher than those charged to persons with whom they have private agreements; but we think, that, acting upon the same view of the statute as we expressed in the case of Ransome *v.* The Eastern Counties Railway Company, antè, p. 437, we ought to enjoin the North Eastern Railway Company not to charge Mr. Oxlade for the carriage of coals at a higher rate than they charge other persons, having a due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other.

The Master was not directed to inquire into the fifth branch of Mr. Oxlade's rule, viz. his demand to have wagons and trucks provided by the company for the carriage of his coal and coke. When the matter was referred to the Master, it appeared to the court that Mr. [*498 *Oxlade, having refused to pay demurrage charged to him at the same rate as to all others under similar circumstances, had no right to ask the company to find trucks: and we continue of that opinion. Nor has he any just ground of complaint, because the company will not carry his coals to Altofts for the purpose of being there shifted into other trucks. They have no convenience for that purpose, and do not give such facility to any other person.

The first branch of the rule remains to be dealt with, viz. that which calls upon the court to enjoin the company "to carry upon their said railway for the said William Oxlade such coal and coke as may be offered by the said William Oxlade for that purpose."

When the rule was first before the court, it was considered that Mr. Oxlade had no right to call upon the company to carry all coal and coke that he might offer for that purpose: and since then an opinion has been expressed by the Court of Exchequer, in an action between

these very parties, that the company are not common carriers of coal,—thus confirming our view of the claim in question.

Upon the whole, then, we are of opinion, that, as to all the matters in the rule, except the latter part of the second branch, which relates to special agreements, it must be discharged: but that, as to special agreements, an injunction must issue as above suggested.

Had Mr. Oxlade confined his demand to that matter, the company might possibly have complied with it. But he has asked a great deal more than he is entitled to. We think, therefore, that we ought not to grant him the costs of his application.

On the other hand, the company have been partially in the wrong: they, therefore, must bear their own costs. Rule accordingly.

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*499] *In the Matter of the Complaint of WILLIAM ADOLPHUS MARRIOTT *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. *Jan.* 30.

A railway company made arrangements, at one of their stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers by any of their trains to and from K., and allowed A. the *exclusive privilege* of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office:—

Held, that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to another who also brought passengers from K. as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences contained in the 17 & 18 Vict. c. 31, s. 2.

QUAIN, on a former day in this term, on behalf of William Adolphus Marriott, obtained a rule calling upon the London and South Western Railway Company to show cause why a writ should not issue "enjoining them to admit the omnibus of the said W. A. Marriott into the yard of the Kingston station of their railway at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from their said railway, and in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose;" and why the said company should not act in compliance with the Railway and Canal Traffic Act, 1854.

The rule was moved upon the affidavits of the applicant himself, of his driver, his attorney, and of a gentleman who was a frequent passenger by the applicant's omnibus.

The applicant in his affidavit stated that he was the owner and proprietor of a certain omnibus running from Twickenham station on the Richmond and Windsor line of railway to the Kingston station on the London and South Western railway, and that the said omnibus commenced running on the 27th of October last, and daily received pas-

sengers and luggage, and also goods and parcels of persons not passengers, and forwarded the same from the said Twickenham station and intermediate *places by his omnibus, and delivered the same at the said Kingston station for the purpose of being conveyed by [*500 the said London and South Western railway, without any hindrance or molestation on the part of the said London and South Western Railway Company or their servants, from the said 27th of October up to Saturday the 15th of November last: That the said Kingston station is surrounded by a large yard enclosed by a brick wall on the south side, the Railway Tavern on the north side, and by an iron railing on the west side or front thereof, which iron railing has three sets of double gates for the ingress and egress of carriages and vehicles bringing traffic to the Kingston station; and the said station is approached by carriages passing through the said gates and over the said enclosed yard up to the said station, and in no other way: That, on several occasions, the complainant's omnibus was excluded from the said yard by the company's servants, and on one occasion his passengers in consequence lost the train: That the said yard is of considerable extent, and more than sufficient for the accommodation of all the public and private carriages using the same, and taking up or setting down and delivering passengers and luggage, &c., there, to be forwarded by the said railway; and the said yard is used by the public generally approaching the said Kingston station either on foot or in carriages public or private for the purpose of forwarding passengers and luggage, goods, and parcels by the said railway, without any hindrance or molestation on the part of the company, and such yard has been so used by the public for several years without the gates being ever closed: That there is a public coach running daily from Horsley and Leatherhead to the Kingston station, for the conveyance of passengers and luggage, goods and parcels, from Horsley, Leatherhead, and intermediate places, to the Kingston station, to be forwarded by the said railway, and also for *the conveyance [*501 of passengers from the Kingston station to those places; and such coach delivers and takes up such traffic as aforesaid at the said Kingston station, and passes through the said iron gates, and over the said yard, for that purpose, without any hindrance or molestation on the part of the company or their servants, and has done so for a long space of time; that there is also an omnibus running from the old town of Kingston-upon-Thames for the conveyance of passengers, luggage, &c., therefrom to the Kingston station, and vice versâ, which omnibus runs to some of the up and down trains stopping at the Kingston station in the course of the day, and delivers and takes up such traffic as aforesaid at the said Kingston station, and passes through the said iron gates, and over the said yard, for that purpose, without any hindrance or molestation on the part of the company or their servants, and has done so for a long space of time, receiving from the company pecuniary and

other assistance and accommodation; and that the complainant's omnibus is the only carriage or vehicle, public or private, that is ever hindered or molested in its approach to the said Kingston station for the purpose of delivering and taking up passengers, luggage, &c., thereat, and that is refused admittance into the yard for that purpose: That the complainant's omnibus had continued running to and from the Kingston station daily from the 15th of November last down to the present time, and the company's servants upon his approach invariably closed the gates of the yard, and the passengers were obliged to get out and walk with their luggage from the gates to the station, a distance of about seventy-five feet, to their great inconvenience and annoyance: That the complainant's omnibus was a great convenience and accommodation to passengers residing at Twickenham, Teddington, Hampton Wick, and Kingston, and intermediate places,—more particularly to Teddington and Hampton Wick, *in which latter place were several residents who were constant passengers by the railway to and from the Kingston station, and holders of season-tickets, and who travelled constantly by the complainant's ombnibus to and from the said station, being taken up and set down thereby at their own residences or immediately adjoining thereto, the complainant's omnibus being the only mode of conveyance from Twickenham, Teddington, and Hampton Wick to and from the said Kingston station. The affidavit then proceeded to set out a correspondence which the complainant had had with the secretary of the company upon the subject of his exclusion from the station yard, in the course of which such exclusion was attempted to be justified by the company on the ground that the station yard was their private property, and that they were of opinion that the rival omnibus above referred to afforded ample accommodation to the public: and it concluded with a general allegation "that the company, by reason of their closing the gates of the yard of the said station against the complainant's omnibus as aforesaid, did not afford him such reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their said railway as he was entitled to; and that the company made and gave an undue and unreasonable preference and advantage to and in favour of the rival omnibus and the other public coaches and vehicles going to and from the said Kingston station, by allowing them free access to the yard of such station and refusing him admittance thereto; and that they thereby subjected him and the traffic conveyed by his said omnibus to an undue and unreasonable prejudice and disadvantage."

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The above affidavit was confirmed in all material particulars by that of the driver of the complainant's omnibus; and the affidavit of the complainant's attorney stated a refusal on the part of the company to afford him *the accommodation which he (the deponent) had demanded of them on his behalf.

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The affidavit of R. W. Lack, a resident at Hampton Wick, and a constant traveller by the railway to and from the Kingston and Waterloo stations, stated that the deponent had for some time past been in the habit of travelling by an omnibus belonging to Marriott, running from the Twickenham station on the Richmond and Windsor line, through Hampton Wick, to the Kingston station; that such omnibus was a very great convenience to the deponent and the residents in Hampton Wick generally, as it was *the only public conveyance existing for passengers and traffic from Hampton Wick to the said Kingston station;* that, on the 17th of November last, the deponent was proceeding in the said omnibus to the Kingston station, for the purpose of travelling by the railway to London, and on the said omnibus approaching the Kingston station, the gates forming the means of ingress into the yard of the station were closed, and the servants of the company refused to admit the said omnibus into the said yard for the purpose of delivering the passengers, luggage, and parcels carried thereby, and, in consequence of the delay and confusion caused by such conduct on the part of the said servants of the company, the deponent lost the train, whereby he was greatly damaged and inconvenienced; that this conduct on the part of the servants of the company had been persisted in on several occasions, to the great inconvenience of the deponent and other parties passengers by the said omnibus, and from the fact of the outer gates of the yard of the said station being at a distance of about seventy-five feet from the station, passengers by the said omnibus were greatly annoyed and inconvenienced; and that this inconvenience was greatly increased by rainy weather, and more particularly so in the case of females.

*The case of Barker, App., The Midland Counties Railway, Resp., 18 C. B. 46 (E. C. L. R. vol. 86), was referred to. [*504

Bovill, Q. C., and *Hawkins* showed cause, principally upon the affidavits of Archibald Scott, the traffic manager of the South Western Railway Company, and John Dudman, the inspector of police at the Kingston station. The affidavit of Mr. Scott stated, that the station yard and approaches at the Kingston station were the property of the company, subject only (as to a portion of it) to a right of way on foot and on horseback, and with or without carriages or horses, and for all purposes, in, over, through, across, or along the same, for the present and all future occupiers of the Southampton Railway Hotel and his and their customers, servants, and agents, and all persons going to and from the said hotel, and the garden, stables, and other premises held and occupied therewith, for the proper and complete enjoyment of the said hotel and premises: That the complainant did not, before commencing to run his omnibus, ask permission to enter the station yard with his omnibus: That the directors of the company, after consultation and due consideration of all the circumstances, not being willing to allow the complainant's omnibus to enter the yard, gave instructions to their

servants to exclude him: That it is highly necessary for the proper working and management of the traffic upon the said railway, and for the avoidance of discomfort and inconvenience to the passengers travelling upon the said railway, that the admission of public conveyances to the stations of the company, and their proper regulation while in the station yards, should be under the entire control of the company and their officers, *for the purpose of enabling the company to regulate the charges to be made by the proprietors of the said public conveyances, and for preventing unseemly rivalry between such proprietors of public conveyances, to the *annoyance of the passengers travelling upon the railway*, and that this control is particularly needed at the Kingston station, not only from its vicinity to London, and the number and respectability of its inhabitants, but also from its proximity to Epsom race-course, and the necessity of duly regulating the great increase of traffic to and from the said station at the periodical occurrence of such races: That there had been from time to time, and there was, an omnibus running between the said Kingston station and Kingston and Norbiton, of which one John Williams was the proprietor: That the omnibus accommodation at the Kingston station provided by Williams was ample and sufficient for all the present traffic to and from the said station: That, by the terms of an arrangement made between the company and Williams, the latter was bound to find and provide any additional omnibus or omnibuses to run to and from the said Kingston station as should be required to accommodate the traffic to and from that station and its vicinity: That no complaint had been made of the deficiency or insufficiency of the present omnibus accommodation at the Kingston station: That Williams did not receive any pecuniary or other assistance and accommodation from the company in working his omnibus: That the complainant formerly worked the said omnibus to and from the said Kingston station and Norbiton, as the same is now worked by Williams: That the said omnibus so started by the complainant, so far as it runs between Kingston station and Kingston, is not required for public accommodation so far as respects Kingston or Norbiton or any place between Kingston and Norbiton and the said station: That, so far as the complainant's omnibus ran from Twickenham station, on the Richmond and Windsor line, to the Kingston station, it was *in competition with the traffic of the London and South Western Railroad Company* to and from Twickenham station, *and was not required for public accommodation:* That the deponent verily believed that the said omnibus was started by the complainant to run between the Twickenham and Kingston stations, not for the *bonâ fide* purpose of providing better or more extended accommodation for the public and passengers travelling upon the said London and South Western railway to and from the said stations respectively, but for the purpose of annoying the company and Williams, and interfering with the traffic upon the said

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railway, and of the said omnibus of Williams. The affidavit then went on very irrelevantly to allege that the complainant was a very ill-regulated and troublesome fellow, and that therefore, *and for other reasons*, the directors "were not disposed to grant him any favour or indulgence."

The affidavit of Dudman stated, amongst other things, that the deponent had the superintendence of the porters at the Kingston station; that, to the best of his belief, the porters at that station carried the luggage and parcels of, and attended upon, the passengers arriving by the complainant's omnibus in the same way and to the same extent as they carried the luggage and parcels of, and attended upon, the other passengers arriving at the Kingston station by any other omnibus or public or private conveyance; and that, so far as he was aware, no goods had ever been brought by the said omnibus to the Kingston station for carriage on the said railway, other than the luggage of passengers, and small parcels; and that no complaint had ever been made to the deponent by any passengers travelling upon the said railway to and from the Kingston station, of the insufficiency of the omnibus accommodation provided at the station; and that, in the judgment of the deponent, the omnibus worked by Williams to and from the said station and Kingston and Norbiton, afforded *ample accommodation for all passengers and traffic to and from the said station and Kingston and Norbiton.*

*Several other affidavits were produced, which, besides containing a vast deal of irrelevant matter, reiterated in every conceivable shape the denial that any passenger had sustained or could sustain inconvenience or annoyance from any want of attention or accommodation at the station; and one of them gave the particulars of a pugilistic contest which had occurred at the gates of the station, between the driver of Williams's omnibus and the conductor of Marriott's, and which resulted in the fracture of the conductor's leg. Williams also made an affidavit vehemently protesting that his conveyance gave the public all the accommodation that could be desired, and that there was not throughout the year more than sufficient traffic to and from the Kingston station to afford a fair remuneration to one omnibus. [*507

The above affidavits having been read,

Lush, on behalf of the complainant, proposed to file additional affidavits in answer to "new matter" therein contained. The affidavits so proposed to be filed were those of four inhabitants of Hampton Wick and four of Kingston, complaining of inconvenience which they had sustained from the conduct pursued towards Marriott by the company.

Bovill, for the company, objected that these affidavits were not in answer to new matter, but merely contained allegations confirmatory of the matters already stated in the affidavits upon which the rule was moved.

The Court seemed to think that the affidavits ought not to be received;

but it became unnecessary formally to decide the point. The affidavits, however, were handed in, and filed.

*508] *Bovill* and *Hawkins* proceeded to show cause.—This *is a question of serious importance to railway companies; for, if Mr. Marriott can insist upon driving his omnibus into the station yard of the South Western Railway Company at Kingston, what is to prevent every Paddington omnibus from being driven into the station of the Great Western railway to ply for passengers? Seeing that competition must necessarily be productive of confusion and riot, the company have thought fit to make arrangements with Mr. Williams to provide sufficient accommodation by means of omnibuses for passengers coming to and going from the railway. [COCKBURN, C. J.—According to your affidavits, the company provides that sort of accommodation for the people of Kingston and Norbiton only; whereas, it appears that there are persons who come from Twickenham and Hampton Wick whose sole reliance must be on Marriott's omnibus. The avowed object of excluding Marriott, is to avoid competition, which is generally supposed to be beneficial in all other matters. It may be that the company would not be bound to admit *all* vehicles of this description; but here, it seems, they exclude all but one. CRESSWELL, J.—The words of the statute are, "*undue* or *unreasonable* preference," or "*undue* or *unreasonable* prejudice."(*a*) If the wants of the public, or the convenience of the company, make it desirable to admit or to exclude omnibus A. or omnibus B., it may be that they would be justified in so doing.] Williams being under the more immediate control of the company, a preference is given to him, in return for his undertaking to secure ample accommodation for the public. [CRESSWELL, J.—That is granting him a monopoly for certain considerations. Unless you can show that it is reasonable, with reference to the safety of the public and the maintenance of order in the

*509] station, you are directly within the prohibition of the statute *against the giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company."] It is sworn that there never has been any complaint of want of accommodation on the part of the company. [CRESSWELL, J.—Suppose there is not any want of accommodation,—how does it appear that the admission of the complainant's omnibus would impose any undue or unnecessary trouble or inconvenience upon the company?] The affidavits show that in one instance at least serious mischief has resulted from the rivalry. [CRESSWELL, J.—Rather from the exclusion of Marriott.] It is submitted that it is not unreasonable for the company to do as they have done, inasmuch as it tends to secure a regular and unfailing accommodation to the public. [COCKBURN, C. J.—How does it appear that the public will be better served by confining the facilities to one individual than by open competition? Every monopoly might be upheld upon the

(*a*) See the section, antè, p. 410.

same grounds as you suggest. CRESSWELL, J.—You do not show that any other person besides Williams and Marriott wishes to drive his omnibus into the station.] Are the company to have no power to make regulations giving an advantage to one who contracts with them, and for their advantage, to supply accommodation at all times to the public? They might, if so minded, exclude every public vehicle from their premises. [COCKBURN, C. J.—Then they would possibly not be affording reasonable facilities for receiving and forwarding the traffic, and so might fall under the lash of the other branch of the clause.(a)] The object is, to accommodate the public, not to give a preference to Williams. [COCKBURN, C. J.—The effect is so. The only question is, whether there is a corresponding benefit to the public. I see none.]

*_Lush_ and _Quain_, in support of the rule, were not called upon. [*510

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. It seems that the South Western Railway Company have entered into an arrangement with one Williams, whereby they admit his omnibus to the door of the station at Kingston for the purpose of letting down and taking up passengers and their luggage, and that they exclude all others. The effect is, that while Williams conveys his passengers coming from Kingston and Norbiton to the door of the booking-office, Marriott's passengers, some of whom come from Hampton Wick and Twickenham, being excluded from the station yard, are subjected to the inconvenience of being set down with their luggage in all weathers at the gate, which is about seventy-five feet distant from the door of the booking-office. I am of opinion that that is giving an undue and unreasonable preference and advantage to and in favour of Williams, and brings the company within the provisions of the statute in question. I see no sufficient reason why this preference should be given to one omnibus, to the exclusion of another. I can very well understand that a case might arise, where, by reason of the limited extent of their premises, a railway company might be justified in making arrangements for the admission of a certain number only of public vehicles. But nothing of the kind is suggested here. It is said that the arrangement entered into by the company with Williams enables them to secure better accommodation for the public. But, in the first place, the company do not show facts, even as regards the inhabitants of Kingston and its vicinity, whence we can infer that reasonable accommodation would not be secured at least as well without this arrangement; and, in the next place, assuming that it may be a convenient arrangement as far as *the Kingston people are concerned, it does not apply to the rest of the public. Looking at all the circumstances, it does not appear to me that any public benefit is shown, to justify the course pursued by the company. But, on the [*511

(a) Antè, p. 411. As to this, see the observation of Cresswell, J., in Oxlade's Case, antè, p. 493.

contrary, I am of opinion, that, as the result of the arrangement, the balance of convenience is against the public, and that this is a case of undue and unreasonable preference within the meaning of the statute, without any corresponding advantage to the public to justify it. I therefore think the rule should be made absolute to the extent of enjoining the company to admit the complainant's omnibus into the station of their railway at all reasonable times, for the purpose of receiving and setting down passengers and goods, in the same manner and to the same extent as other public vehicles of a similar description are admitted into the yard for that purpose. But, as to the rest of the rule, that which is asked is too vague, and should be omitted.

CRESSWELL, J.—I am of the same opinion. It appears to me, that, by the course pursued by the company in arbitrarily excluding Marriott's omnibus from the station yard, the passengers are subjected to an undue inconvenience, and that therefore the rule should be made absolute.

WILLIAMS, J.—I am of the same opinion, though I should have thought differently if it were to be taken, that, in coming to this conclusion, we must lay it down as a general rule that all public vehicles have a right to enter any railway station for the purpose of receiving or taking up or setting down or delivering passengers and goods. The present case is decided upon its own special circumstances.

*512] CROWDER, J.—I also am of opinion that this rule *should be made absolute to the extent stated by the Lord Chief Justice, on the ground that the company, by the course of conduct pursued by them towards the complainant, have subjected him and his passengers to a greater degree of inconvenience than the passengers by Williams's omnibus have been subjected to. For instance, all passengers who come from Teddington and Hampton Wick by the complainant's omnibus are subjected to the inconvenience of being set down at the gate of the station yard, whereas Williams's passengers coming from Kingston and Norbiton are allowed to be driven into the yard and up to the door of the booking-office. That is clearly giving the one set of passengers an undue and unreasonable preference and advantage over the others, and constitutes one of those cases in which the legislature has by the recent statute authorized us to interfere.

Lush asked for the costs of the application.

Bovill, Q. C., objected that the rule did not ask for costs.

CRESSWELL, J.—If the rule *had* asked for the costs, I do not know that we should have given them, under the circumstances. But, is there any instance of costs being given where they are not asked for in the rule?

WILLIAMS, J.—Can the complainant be in a better position than he would have been in if the rule had been made absolute without any cause shown?

Prentice, Amicus Curiæ, mentioned a case where upon a motion for a

mandamus to justices under Jervis's Act, 11 & 12 Vict. c. 44, the court of Queen's Bench a *few days ago told him that he must not ask for costs on the rule nisi. [*513

CRESSWELL, J.—It will be well for Mr. *Prentice*, when cause is shown against that rule, to be prepared to meet an argument that he is too late to ask for costs when the rule is made absolute.

Bovill.—The case referred to is totally different from the present. There, the act gave the court a statutable power, s. 5 providing, "that, if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute with or without or upon payment of costs, as to them shall seem meet."

COCKBURN, C. J.—What more is that than giving the court the power it has in all cases to give or to withhold costs? A general rule of practice has been laid down, that costs shall not be given unless they are asked for by the rule.

Lush.—The motion is for a writ of injunction. Upon the argument, the court might find it necessary to refer the matter to an engineer or barrister. The case differs, therefore, from the ordinary case of a motion which may be disposed of on cause shown. If costs were asked for on the motion, they could only be the costs of *the rule*, and not costs of any ulterior proceedings.

CRESSWELL, J.—Why not? The usual way of asking for costs, is, "together with the costs of and occasioned by this application." In Ransome's Case, ante, p. 437, costs were asked by the rule.

WILLIAMS, J.—If you had moved the rule with costs, you would have incurred the risk of paying costs in the *event of its being discharged; for, though the court *may* discharge with costs a rule which does not ask for costs, it is by no means a matter of course to do so. [*514

COCKBURN, C. J., (after a short conference with the rest of the court.)—Although the power to give costs in these cases arises upon the statute, we think it is better to adhere to the general rule, not to give them where they are not asked for by the rule, unless there are special circumstances. Rule absolute, without costs.(a)

(a) The rule was drawn up as follows: "It is ordered that a writ of injunction do issue against the said London and South Western Railway Company, enjoining them to admit the omnibus of the said William Adolphus Marriott into the yard of the Kingston station of their railway at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from their said railway, and in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose."

*515] *BAKER *v.* THE BANK OF AUSTRALASIA. *Jan.* 29.

A bill was drawn by the Melbourne branch of the Bank of Australasia upon their house in London, in favour of a married woman, and remitted to her by her husband, and duly accepted by the London house. After the bill had been so accepted, and had been endorsed by the wife for value, but before its maturity, the husband (who had in the meantime arrived in this country) gave notice to the bank not to pay it, his wife having eloped. The bill becoming due, and the bank being sued by the endorsee:—Held, not a case for an interpleader,—defendants having an interest in the subject-matter of the suit, and the question whether or not they were estopped from contesting the payee's right to endorse not being one which could be tried in an issue between the plaintiff and the claimant.

COLERIDGE, on a former day in this term, obtained an interpleader rule, under the following circumstances:—

The Bank of Australasia carries on its business at No. 4, Threadneedle Street, London, having branches in the several Australasian colonies, and, amongst others, one at Melbourne. On the 4th of August, last, a bill for 54*l.* was drawn upon and directed to the Bank of Australasia in Threadneedle Street, by the branch bank at Melbourne, payable thirty days after sight to the order of Sarah Ann Abraham; which bill was accepted by the said Bank of Australasia in Threadneedle Street on the 21st of November, and was endorsed by Sarah Ann Abraham. The bill when accepted was given up to Sarah Ann Abraham, the payee. A few days after the bill had been accepted, a person called at the office of the bank in Threadneedle Street, who represented himself to be the husband of the said Sarah Ann Abraham, the payee, and stated that he had remitted the said bill to her from Melbourne, in a letter, and that he had arrived in London shortly after the receipt of the bill by her, and found her cohabiting with another man; and that he had called in consequence at the office to stop payment of the bill. A written notice to the same effect was subsequently served upon the bank. On the bill becoming due, viz. on the 24th of December, it was duly presented at the bank for payment, and refused, and notice thereof was given to Abraham's attorney. On the 6th of December, a demand of payment was made upon the bank by an attorney on behalf of one William Baker,
*516] *who was represented to be the holder thereof; and on the 30th the bank was served with a writ of summons, and with a declaration on the 8th instant.

The affidavit upon which the motion was founded, after setting forth the above facts, stated that the bank were threatened with proceedings at the suit of Abraham if they paid the amount of the bill to Baker, and negatived collusion.

Regan *v.* Serle, 9 Dowl. P. C. 193, was referred to.

Prentice showed cause on behalf of Baker, upon an affidavit alleging that he was the bonâ fide holder of the bill for value, having discounted it for the payee on the 22d of November last, who then endorsed it to him; that he took the bill upon the faith of the defendants' acceptance, and in the bonâ fide belief that Sarah Ann Abraham, the payee thereof,

had authority to endorse it; and that there was no collusion, agreement, or understanding, either directly or indirectly, between the said Sarah Ann Abraham and himself, or between any other person acting on her behalf and himself, in reference to the bill. This clearly is not a case for relief under the interpleader act. A defendant is only entitled to call upon the plaintiff and a third party to interplead, where he can show by affidavit "that he does not claim any interest in the subject-matter of the suit." Here, the defendants do claim an interest in the subject-matter. [COCKBURN, C. J.—They are interested only to the extent of seeing that they pay the money to the right person.] This is a case of contract: and there are many authorities to show that it is not within the act. Thus, in Grant *v.* Fry, 4 Dowl. P. C. 135, it was held that a contested claim to a reward advertised for the apprehension of a felon, cannot be made the subject of a motion under the act. So, in Newton *v.* Moody, 7 Dowl. P. C. 582, it was held, that, where a party has given a promissory *note for money due by him and which is deposited with a third person for the benefit of a creditor, and [*519 an action is brought upon it by the trustee, it is no ground for obtaining relief under the interpleader act, that an action is anticipated at the instance of the creditor: and Coleridge, J., observed,—"It cannot be said that the defendant 'does not claim any interest in the subject-matter of the suit.' It is a matter of interest to him to know to whom he is to pay the money." Again, in James *v.* Pritchard, 7 M. & W. 216,† the defendant, having bought a rick of hay from the plaintiff (who was the executor de son tort of M. S.), before payment of the price received notice from a third party stating that *he* was administrator of M. S., and demanding payment of the sum for which it had been sold: the defendant being subsequently sued by the plaintiff for the price of the hay,—it was held that he was not entitled to relief under the interpleader act. And in Dalton *v.* The Midland Railway Company, 12 C. B. 458 (E. C. L. R. vol. 74), an action having been brought by A. against a railway company to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A,—it was held that the company were not entitled to relief under the interpleader act. Turner *v.* The Mayor &c. of Kendal, 13 M. & W. 171,† is an authority to the same effect. Besides, it is clear, upon the facts disclosed on the affidavits, that the bank can have no defence to this action; for, they are estopped from contending that Sarah Ann Abraham, in whose favour the bill was drawn by their branch bank at Melbourne, had no authority to endorse: Smith *v.* Marsack, 6 C. B. 486 (E. C. L. R. vol. 60); Halifax *v.* Lye, 3 Exch. 446,† 6 D. & L., 424; Byles on Bills, 7th edit. p. 171.

Bushby, for the claimant, submitted that the authority *of the wife to endorse the bill was revoked, and that the bank had no [*520

answer to his claim. It appeared from his affidavit that he arrived in England on the 23d of November, and on the following morning, having discovered his wife's infidelity, gave notice to the bank not to pay the bill.

Coleridge, in support of the rule.—No doubt, the authority of a wife to endorse may be revoked: and it was so here. The drawer of a bill by accepting it only admits what appears upon the face of it. [COCKBURN, C. J.—Have you any authority to show that this is a case within the statute?] The case of Regan *v.* Serle, 9 Dowl. 193, is an authority for that. There, actions were commenced by two persons claiming to be the lawful owners of a bill of exchange, against the acceptor: and an issue was directed to try who was lawfully entitled to recover on the bill, and the acceptor was relieved from all claim in respect of costs,—on his bringing the amount of the bill into court. [COCKBURN, C. J.—The question does not seem to have been raised there.] It may be conceded that a party cannot obtain relief under the interpleader act, where he has contracted a personal liability to either of the contending parties: Patorni *v.* Campbell, 12 M. & W. 277,†—following the rule in equity as laid down in Crawshay *v.* Thornton, 2 Mylne & K. 1. [CROWDER, J.—Is not the acceptance of a bill a contract to pay the amount to the holder?] In one sense it undoubtedly is. [COCKBURN, C. J.—What form of issue do you propose?] Whether or not the plaintiff had a right to be the holder of the bill. [CRESSWELL, J.—It may be that the plaintiff may be entitled to be the holder of the bill, and yet the defendants may be liable to pay the amount to the claimant. CROWDER, J.—The question of estoppel could not be tried in an issue between the claimant and the present plaintiff.] It is *521] in the discretion of the court to *grant an issue or not. [CRESSWELL, J.—We have no discretion to grant an issue, unless, as my Brother Crowder suggests, it be to try the very question between the party seeking to interplead and the original party.] In Crellin *v.* Leyland, 6 Jurist, 733, a sum of money had been deposited by the plaintiff while sole with the defendants, who were bankers, and the latter were afterwards served with notice by one M'Gill that the plaintiff was married to him, and that they were not to pay over the money to her: the plaintiff disputed the marriage; and the Court of Queen's Bench held that the case was within the interpleader act. In Frost *v.* Hayward, 12 Law Journ. Exch. 242, an action having been brought by the assignees of a bankrupt against a banker, to recover money deposited with him by the bankrupt, and the bankrupt claiming the money as trustee of a marriage settlement, alleging it to be part of the trust-fund, the court on an interpleader rule directed an issue between the bankrupt and his assignees, to try whether the money was part of the trust-fund or not. [CRESSWELL, J.—The argument on the other side is, that the bank contracted to pay the money to the order of Mrs. Abraham.

CROWDER, J.—In Prestwick *v.* Marshall, 5 M. & P. 513, 7 Bingh. 565 (E. C. L. R. vol. 20), 4 C. & P. 594 (E. C. L. R. vol. 19), it was held that the endorsement by a married woman, with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest in the bill to the endorser, so as to enable him to sue the acceptor.]

COCKBURN, C. J.—I am of opinion that this rule should be discharged. It is unnecessary to determine on the present occasion whether or not this is a case within the act. It is enough for us to say that it is one in which we ought not to interfere. It is impossible to frame an issue between the parties who are called upon to interplead, in which the real question could be tried, *viz. whether, the drawers of the bill having drawn it in favour of Mrs. Abraham, the acceptors (who [*522 are identified with the drawers) are estopped from denying her right to endorse. That is a grave question, which ought to be decided in such a manner as that the opinion of a court of error could be taken upon it; otherwise great injustice might be done.

CRESSWELL, J.—I am of the same opinion. There is a good deal of authority for saying that this case is not within the act. The recital in s. 1 shows that the act was intended for the relief of persons who are sued without having any interest in the subject-matter. Here, it is sought to make the defendants pay damages for not paying to the holder, according to their contract, the amount of the bill. The defendants, therefore, clearly have an interest in the subject-matter of the suit. A question may arise whether the defendants have entered into an absolute contract binding them to pay the bill to the endorsee of Mrs. Abraham, or whether they have contracted to pay the amount to the proper owner, or both. That cannot be tried on a simple issue between the plaintiff and the claimant.

CROWDER, J.—I also think it is very doubtful whether this is a case within the contemplation of the act. But it is quite clear, that, as a matter of discretion, the court ought not to grant the rule. There is much ground for saying that the defendants, by accepting a bill in this form, are estopped from denying the right of Mrs. Abraham to endorse it. I agree with my Lord and my Brother Cresswell in thinking that it would be impossible to frame an interpleader issue so as to try the real question. The intention of the act was, to substitute the claimant for the original defendant so as to try the whole *question. If [*523 that cannot be done, the case is not within the act.

WILLES, J., not having heard the whole of the argument, pronounced no opinion.

Bushby asked for costs on behalf of Abraham, he having been compelled to appear.

Coleridge.—Abraham is clearly not entitled to costs, he having, by telling the defendants that he would hold them responsible, compelled them to come to the court.

PER CURIAM.—The plaintiff's costs will be costs in the cause. Abraham's costs must be paid at once.

Rule accordingly.

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*524] *DOSSETT *v.* HARDING, the Official Manager of THE ROYAL BRITISH BANK. *Jan.* 30.

The 16th section of the 7 & 8 Vict. c. 113, which prescribes the form of memorial to be filed at the stamp-office, is *directory* only; an inaccuracy, therefore, in the heading,—*ex. gr.* a reference to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113,—does not prevent its being evidence against the persons therein named as shareholders.

Whether s. 21 makes it *conclusive* evidence,—*quære?*

A shareholder whose name is properly inserted in the last return or memorial filed at the stamp-office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares.

It is no objection to the notice, under s. 13, that it intimates an intention to move against *two persons*, and the application is confined to *one*.

BYLES, Serjt., on a former day in this term, obtained a rule calling upon Charles Bird Kelsham to show cause why execution upon the judgment recovered by the plaintiff in this cause for 297*l.* 2*s.* should not be issued against the person, property, and effects of the said Charles Bird Kelsham as a shareholder of the said bank, to satisfy the plaintiff in the sum of 216*l.* 12*s.* 2*d.* now remaining due in respect of the said judgment, with interest thereon from the date of the said judgment, pursuant to the 7 & 8 Vict. c. 113, and why the said C. B. Kelsham should not pay to the plaintiff or his attorney the costs of the application, and of the application to Willes, J.

The affidavits upon which the motion was founded, stated that the action was brought to recover the balance of moneys received by the Royal British Bank as the bankers of the plaintiff; that judgment was signed for want of a plea on the 12th of December last for 291*l.* 10*s.* 1*d.*, and the costs had been taxed at 5*l.* 11*s.* 11*d.*, and a fi. fa. issued on the 15th of December against the effects of the bank, and delivered to the sheriffs of London for execution, with a notice endorsed thereon that the Royal British Bank was an incorporated company lately carrying on business at the South Sea House, Threadneedle Street; that the writ had been returned nulla bona, and had therefore been ineffectual to obtain satisfaction of the amount recovered by the judgment;

*525] *that the place above named was the chief office of the bank, where the principal part of its business was carried on; that the officer, on proceeding to execute the writ there, saw Mr. Harding, who stated that he was appointed by the Court of Chancery the official manager of the company, and that he claimed all the property and effects of the company as such official manager, and that the company had no effects whereon the writ could be levied; that, on the 24th of September, 1856, an order was made by Kindersley, V. C., to wind up the affairs of the company under the provisions of the Winding-up Act,

11 & 12 Vict. c. 46, and the said Mr. Harding had been appointed official manager thereunder; that a petition for adjudication in bankruptcy had been filed against the bank, whereunder the said company was on the 8th of October last duly adjudged bankrupt, and assignees were appointed on the 6th of November last; that the deponent had been informed by a clerk in the Inland Revenue Office, Somerset House, who has the custody of the returns made by or on behalf of the Royal British Bank, that the last return(*a*) made by the Royal British Bank was in or about the month of June last; that the name of the said C. B. Kelsham appeared therein as a shareholder; that the plaintiff had proved his debt in the Court of Chancery against the company in pursuance of the requisitions of the Winding-up Act, and had also proved his debt under the fiat, pursuant to the 7 & 8 Vict. c. 111, s. 10; and that the plaintiff had received under the bankruptcy a dividend of 80*l.* 9*s.* 10*d.* on account of his said judgment.

A notice of the plaintiff's intention to apply for execution, pursuant to the 13th section of the 7 & 8 Vict. c. 113, had been duly served upon Mr. Kelsham. This notice was as follows:—

*"In the Common Pleas. [*526

"Between, &c. &c.

"Whereas a judgment was obtained on the 12th of December, 1856, for the sum of 291*l.* 10*s.* 1*d.* debt, and 5*l.* 11*s.* 11*d.* costs, in Her Majesty's Court of Common Pleas at Westminster, in a certain action at the suit of the above-named plaintiff against the said official manager of the Royal British Bank, being a company incorporated under and by virtue of an act, &c., intituled, &c.: And whereas due diligence has been used by and on behalf of the said plaintiff to obtain satisfaction of the said judgment against the property and effects of the said company: And whereas there is not nor are any property or effects of the said company out of which the said judgment, or any part thereof, can be satisfied: And whereas you *William Fanner*, of, &c., *and Charles Bird Kelsham*, of, &c., are shareholders of the said company for the time being: We hereby give you notice, that, upon the expiration of ten days next after the service of this notice upon you the said *William Fanner and Charles Bird Kelsham*, or so soon after the expiration of such ten days as conveniently may be, an application will be made in Her Majesty's Court of Common Pleas for a rule, *or* to one of the judges of the said court for a summons, calling upon *you* to show cause why execution should not issue against you upon the said judgment until the same shall be satisfied. Dated this 18th of December, 1856.

"G. S. & F.

"Attorneys for the above-named plaintiff."

"To William Fanner, of, &c., and
Charles Bird Kelsham, of, &c."

(*a*) A copy of which (duly verified) was produced.

A summons had been taken out before Willes, J., pursuant to this notice, calling upon Mr. Kelsham to show cause why execution should not issue against him. This summons came on for hearing on the 9th instant, when *that learned judge ordered, that, upon Mr. Kelsham bringing 100*l.* into court, and admitting the above notice in time and in other respects valid and subsisting to enable the plaintiff to move the court, the summons should stand adjourned until after such motion.

*527]

Upon the hearing of this summons, an affidavit of Mr. Kelsham was produced, in which he stated, that he was not a shareholder of the Royal British Bank, nor had he been so since the 29th of August last; that the only shares which he ever held of and in the said bank were ten shares which were purchased in his name with the money and in trust for and for the sole and exclusive use and benefit of George Gillott, and which said shares he (Kelsham) bonâ fide sold on the Stock Exchange at the instance and for the benefit of the said George Gillott, in August last, for 82*l.* per share, and the same were then purchased by one Joseph Renfrey, and he (Kelsham) duly executed the deed of transfer from himself to Renfrey, and Renfrey accepted the same and paid the purchase-money, which he (Kelsham) always held at the disposal of, and had as to the greater part thereof paid over to, the said George Gillott; that he had not from or since the time of the said transfer (which was executed on the 29th of August aforesaid) been a shareholder of or in the said bank, nor in any way interested in the same, or in any shares thereof or therein; and that the only notice which had ever been given to him (Kelsham) of the intention to obtain the said summons, was by the notice above set out.

Phipson now showed cause.—1. The first objection which was taken before the learned judge at Chambers, was, that, being a proceeding under an act of parliament which gives new and extraordinary powers to a creditor for enforcing payment of a debt due to him from the bank, it was essential that every step should be taken in *strict conformity with the provisions of the act; and that it was incumbent on the party applying for execution against a shareholder to frame his application in the precise terms of the notice. Here, the notice is addressed to two persons, Fanner and Kelsham, and the rule is obtained calling upon Kelsham only. [COCKBURN, C. J.—How is he prejudiced by that?] The 11th section of the 7 & 8 Vict. c. 113, gives the shareholder against whom an execution issues for a debt of the company, in default of reimbursement by the company, a right to claim contribution from the other shareholders. If the application had followed the terms of the notice, the result of the rule might have been to establish that Fanner was a shareholder jointly with him: the omission, therefore, to join him in the application, is, to remove Kelsham from one mode of proof against a co-contributor, which, in the event

*528]

of a defective memorial being filed, might be material. [CROWDER, J. —You rely upon the chance of the other party appearing and making an admission.] The act of parliament requires a certain course to be pursued; and it must be pursued strictly. 2. The next objection was, that there was no evidence that Mr. Kelsham was a shareholder,—the memorial filed at the stamp-office not being in the form prescribed by the act. The 16th section of the 7 & 8 Vict. c. 113, enacts, "that, within three months after the grant of the said letters patent, and before the company shall begin to carry on their business as bankers, an account or memorial shall be made out according to the form contained in schedule A., wherein shall be set forth the true title or firm of the company, and also the names and places of abode of all the members of such company as the same respectively shall appear on the books of such company, and also the name and place of abode of every director and manager or other like officer of the company, and the name or firm of every bank or banks established or to be established *by such company, and also the name of every town or place [*529 where the business of the said company shall be carried on; and a new account or memorial of the same particulars shall be made by the said company in every year between the 28th of February and the 25th of March, while they shall continue to carry on their business as bankers; and every such memorial shall be delivered to the commissioners of stamps and taxes at the stamp-office in London, &c.; and the company shall from time to time cause to be printed, and kept in a conspicuous place accessible to the public in their office or principal place of business, a list of the registered names and places of abode of all the members of such company for the time being." The 17th section enacts "that the manager or one of the directors of every such company shall, from time to time as occasion shall require, make out in manner thereinbefore directed, and cause to be delivered to the commissioners of stamps and taxes as aforesaid, a further account or memorial, according to schedule B., of the name and place of abode of every new director, manager, or other like officer of such company and also of the name or names of any person or persons who shall have ceased to be members of such company, either in addition to or instead of any former member or members thereof," &c. The 18th section enacts that the several memorials aforesaid shall be signed by the manager or one of the directors of the company, and *shall be verified by a declaration* of such manager or director before a justice of the peace or a master or master extraordinary of the High Court of Chancery, made pursuant to the 5 & 6 W. 4, c. 62. The 19th section enacts "that a true copy of any such memorial, certified under the hand of one of the commissioners of stamps and taxes for the time being, upon proof made that such certificate has been signed with the handwriting of the person certifying

*530] the same, whom it shall not be *necessary to prove to be a commissioner of stamps and taxes, shall be received in evidence as proof of the contents of such memorial," &c. Then comes the 21st section, which enacts "that the persons whose names shall appear from time to time in the then last delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act, as existing shareholders of the company; and shall be entitled to be reimbursed, as such existing shareholders of the company only out of the funds or property of the company, for all losses sustained in consequence thereof." Now, here, the memorial which is relied on to fix Mr. Kelsham as a shareholder is defective in two respects,—it does not follow the prescribed form; and it is verified by *oath*, and not (as the act requires) by *declaration*. The heading to the form in schedule A. to the 7 & 8 Vict. c. 113, is as follows:—"Memorial or account to be entered at the stamp-office in London in pursuance of an act passed in the eighth year of the reign of Queen Victoria, intituled An act to regulate joint-stock banks in England," whereas, the heading to the return filed here is,—"Return or account to be entered at the stamp-office in London on behalf of the Royal British Bank, in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled An act for the better regulating copartnerships of certain bankers in England,"—following the form given in the schedule to the 7 G. 4, c. 46, instead of that given in the 7 & 8 Vict. c. 113. Now, it is clear that no memorial can be evidence against a shareholder, unless it is a memorial under this act. [COCKBURN, C. J.—The memorial here was evidently intended to be made under the 7 & 8 Vict. c. 113. Suppose this memorial had been headed "Return or memorial of the registered shareholders of the Royal British Bank," omitting all mention of the statute, would not that have done?] It is submitted *531] that it would not. The 16th *section expressly provides that the memorial which is to bind the shareholder shall be according to the form contained in schedule A. [COCKBURN, C. J.—Whose duty is it to file the memorial?] It is the duty of the company, no doubt. [COCKBURN, C. J.—Of whom Mr. Kelsham is one.] That is the question in contest. The neglect is that of the corporation. [CRESSWELL, J.—You must admit that they have been acting as a company under the 7 & 8 Vict. c. 113. CROWDER, J.—And that a perfect memorial has been filed, except for the mis-recital of the statute?] No doubt. Still, it is submitted, there must be a strict compliance with the statute. Then, the return is not verified as required by the 18th section. This is an extra-judicial, a voluntary oath: it is at the least extremely doubtful whether the party taking it could be indicted for perjury, if it were false. [CRESSWELL, J.—There is very little in that objection.] Mr. Kelsham's affidavit distinctly negatives his being a shareholder, he having duly transferred his shares to a bonâ fide purchaser on the 29th

of August last. [CRESSWELL, J.—Upon that point you have to encounter the 21st section. If there be a sufficient memorial, the 21st section expressly declares that the persons whose names appear therein shall be liable to all legal proceedings under the act *as existing shareholders* of the company. Those whose names are there are treated as existing shareholders, whether they are shareholders in point of fact or not.] The legislature could not have intended that the memorial should be more than *primâ facie evidence* of the fact of the parties therein named as shareholders being such. [CRESSWELL, J.—They do not seem to have said so.]

Byles, Serjt., in support of the rule.—The objections which have been urged in this case are all disposed of by a decision pronounced by the Court of Queen's Bench this morning in a case of Henderson *v.* The Official *Manager of the Royal British Bank,(*a*) where it was held, that the fact of the party's name being in the register is [*532 conclusive, and that all that is said in s. 16 as to the manner in which the memorial is to be made out, is *directory* and not *conditional*. The court also held there that the case is not altered by the fact of the shareholder having been induced to become such by the fraud of the directors; but that question does not arise here.(*b*)

PER CURIAM.—We quite concur in the propriety of the decision which has just been referred to. It is therefore unnecessary to say more than that the present rule must be made absolute, and with costs.

Rule absolute accordingly.

(*a*) Since reported in 3 Jurist, N. S. 111.

(*b*) Powis *v.* Harding, post, p. 533. See a note of Lord Campbell's judgment in the case of Henderson *v.* The Official Manager of the Royal British Bank, post, p. 549.

*POWIS *v.* HARDING, Official Manager of THE ROYAL BRITISH BANK. *Jan.* 30. [*533

It is no answer to a rule for execution against a shareholder in a joint stock banking company, that the party against whom the execution is sought was induced to become a shareholder by the false and fraudulent representations of the directors as to the solvency of the concern.

The 16th section of the 7 & 8 Vict. c. 113, which prescribes the form of memorial to be filed at the stamp-office, is *directory* only: an inaccuracy, therefore, in the heading,—*ex. gr.* a reference to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113,—does not prevent its being evidence against the persons therein named as shareholders.

Whether s. 21 makes it *conclusive* evidence,—*quære?*

LUSH (with whom was *Beasley*), on a former day in this term, upon affidavits substantially the same as those filed in Dossett *v.* Harding, antè, p. 524, moved for a rule calling upon Andrew Beattie, a shareholder, to show cause why execution should not issue against him upon a judgment against the Royal British Bank for 576*l.* 1*s.* 6*d.*, pursuant to the 7 & 8 Vict. c. 113. It was sworn that the name of Andrew

Beattie appeared in the return made to the stamp-office pursuant to the statute, on the 29th of June last; and it appeared that the return, like that in Dossett *v.* Harding, purported to be a return under the 7 G. 4, c. 46, instead of under the 7 & 8 Vict. c. 113. They submitted that the return was conclusive of the fact of the parties therein named being shareholders; that their liability continued, notwithstanding a transfer of the shares, until a new or further memorial was filed, as provided by s. 17; and that the mere circumstance of the memorial in its heading referring to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113, made no difference, inasmuch as the 16th section was directory in that respect, and not conditional, and for the benefit of the public. [CRESSWELL, J.—If a false return was made, containing the name of one who never was a shareholder in point of fact, would he be liable merely because some one had thought fit to put his name there?] It is not necessary to contend for that here: this person's name was placed on the memorial with his own consent.

*534] *Hugh Hill* and *Mellish* showed cause in the first *instance, upon an affidavit by Mr. Beattie which stated in substance as follows:—That he was not a shareholder in the Royal British Bank, but, on the contrary, a creditor of the said bank, under the following circumstances: That, in October, 1850, shortly after the Lambeth branch was opened, he removed his banking account from The London and Westminster Bank, and opened an account at the Lambeth branch of the Royal British Bank, and continued to keep such account there down to within a short time before the bankruptcy of the said bank; and, during part of such period, he also kept a deposit account with the said bank: That, in consequence of such account, he had frequent occasion to attend at the Lambeth branch of the said bank, and from time to time had conferences with Mr. M. Pellatt and Mr. Allardice, who were successively managers of the said branch, upon business relating to and arising out of his said account: That, after he had banked with the said bank for one or two years, Mr. Allardice very frequently urged upon him the flourishing and prosperous condition of the bank, and the future prospects of success, and on several occasions, and particularly when there was a large balance credited to him on his said account, represented to him the advantage of investing a portion of such balance in the purchase of shares in the said bank, and from time to time placed in his hands the half-yearly reports and balance-sheets of the affairs of the said bank, as confirming the truth of what he had stated, and showing the soundness and stability of the said bank: That deponent believed the local manager of the said branch, and the other local managers of the said bank, were authorized and desired by the directors of the said bank to make such statements, and to try thereby to induce the creditor customers of the said bank and other parties to become shareholders in the said bank: That the the said Mr.

Allardice also *informed deponent that a friend of his had paid several thousand pounds to a deposit account with the bank, to [*535 be exchanged for shares when the same were issued, and wished to dispose of part of his said deposit account, as he was about going to India; and that it would be the same thing whether he paid 500*l.* to the bank or paid the said friend 500*l.*, and had 500*l.* of his deposit account transferred to him: That deponent carefully perused and considered such reports, and also the report and balance-sheet of the said bank which about that time and for several years previously were and had been, as deponent believed, with the knowledge and consent of the directors of the said bank, published in the newspapers: That, by one of the said balance-sheets, dated the 1st of February, 1854, it was stated that the assets of the said bank consisted of certain particulars, the second of which was as follows:—

	£.	s.	d.
"By loans on convertible securities for short periods, advances on cash credit accounts, bills discounted, &c. . . .	715,666	5	7"

That, in the said report and balance-sheet, the balance of assets above liabilities was stated to amount to 35,374*l.* 1*s.* 11*d.*, out of which a dividend was declared of 6*l.* per cent. per annum; and that, in the report and balance-sheet, the said sum of 35,374*l.* 1*s.* 11*d.* consisted of the following items:—

	£.	s.	d.
"To reserved fund as at 31st December, 1852, as per report for third year	7,500	7	7
"To dividend thereon	117	16	1
	£7,618	8	8
"To unappropriated balance at ditto	2,583	10	7
"To gross balance for the year ended 31st December, 1853, after providing for interest, 19,485*l.* 9*s.* 11*d.* paid and due on deposits, promissory notes, and balances . . .	25,171	18	8
	£35,374	1	11"

*That, in full faith and belief that the statements contained in the said published report and balance-sheet of the said bank [*536 were true representations of the affairs of the said bank, the deponent was induced, on or about the 15th of March, 1854, to agree to pay the said 500*l.*, on receiving notice from Mr. Allardice; and that a day or two afterwards he received from Allardice a letter enclosing an alleged broker's note purporting to relate to the same, and requesting payment of the money: That, on the 27th of March, 1854, deponent paid the said bank 502*l.* 10*s.*, being 500*l.* for the alleged purchase-money for the said alleged shares, and 2*l.* 10*s.* for alleged brokerage or commission on the purchase thereof; and on the same day he received from Allardice some papers which were in effect an acknowledgment that he had 500*l.* to deponent's credit with the said bank on a deposit for shares: That,

early in August, 1854, deponent received from the said bank the half-yearly report and balance-sheet dated the 1st of August, 1854, and early in February, 1855, he received from the said bank the report and balance-sheet dated the 1st of February, 1855, and perused and carefully considered the same: That the said report and balance-sheet dated the said 1st of February, 1855, contained, amongst other things, a statement that the assets of the bank consisted of certain particulars, the second of which was as follows:—

"By loans on convertible securities for short periods, advances on cash credit accounts, bills discounted, &c. . . .	804,798 16 7"

That the said report and balance-sheet also stated that the balance of assets above liabilities amounted to 38,371*l.* 13*s.* 3*d.*, out of which sum a dividend was declared at the rate of 6*l.* per cent. per annum, free of income-tax; and that the sum of 38,371*l.* 13*s.* 3*d.* was stated therein to consist of the following items:—

"To reserved fund as at 31st December, 1853, as per report for fourth year	10,766 6 11
"To dividend thereon	149 18 9
	£10,916 5 8
"To unappropriated balance at ditto	3,142 15 5
"To gross balance for the year ended 31st December, 1854, after providing for interest, 25,610*l.* 16*s.* 7*d.* paid and due on deposits, promissory notes, and balances . . .	24,312 12 2
	£38,371 13 3"

That, early in March, 1855, deponent received from the said bank the circular dated March 6th, 1855, of which the following is a copy:—

"The Royal British Bank.
"Incorporated by Royal Charter, 1849.

"Governor, Edward Esdaile, Esq.
"Deputy Governor, Archibald Spens, Esq.

"Directors,

"Humphrey Brown, Esq., M.P.	H. D. Macleod, Esq.
"L. De Woolfe Cochran, Esq.	W. D. Owen, Esq.
"Edward Esdaile, Esq.	Arch. Spens, Esq.
"R. H. Kennedy, Esq., Alderman.	L. M. Valiant, Esq.

"Hugh Innes Cameron, Esq., General Manager.
"Chief Office, Tokenhouse Yard, Lothbury, &c.

"The directors of the Royal British Bank have the pleasure to inform their shareholders and customers that they have received from the Crown a supplemental charter authorizing them to increase the capital stock of the bank by the sum of 500,000*l.* beyond its present

amount, in such sums and at such times as they may think expedient for the interests of the bank.

"In pursuance of the powers conferred upon them *the directors have determined to make an addition of 300,000*l.* to [*538 the present capital stock of the bank

"Subscriptions to the amount of 100,000*l.* have already been received; and the directors are now prepared to receive further applications for new shares. The shareholders and principal customers of the bank will receive a preference in the allotment of the new shares; and such of them as are desirous of subscribing to the additional stock are requested to signify their intention to the directors without loss of time.

"The shares are 100*l.* each; and the law requires that 50*l.* be paid up before the certificates can be issued.

"In order to meet the convenience of subscribers who do not wish to pay the whole amount of their shares at once, they will be required to pay up 10*l.* upon allotment, and the remainder within six months from that date. Interest at the rate of 5 per cent. per annum will be allowed on the deposits.

"The directors take this opportunity of announcing that they have been fortunate enough to secure on lease, with option of purchase, that portion of the South Sea House the principal front of which is in Threadneedle Street, where the head office of the bank will be established.

"This arrangement has been effected on terms which have not only secured a very important profit to the bank, viewed simply as an investment of capital, but will release the bank, upon a fair calculation based on the actual returns of similar properties in the like favourable position, of any augmentation of their present annual rent-charge.

"The results presented by the existing joint stock banks offer abundant proof that an ample field exists for the profitable employment of capital in banking business. The reports of the older joint stock banks show an average dividend for the last year of upwards of 14*l.* per *cent. per annum, after the payment of income-tax, and an in- [*539 creased value of the paid up capital of upwards of 100 per cent.: and it will be found that the Royal British Bank has not been less successful than the older establishments, if the comparison be made at corresponding periods of their existence."

That, towards the latter end of March, 1855, deponent received from the said bank a notice requesting him to call at the head office of the said bank and sign the supplemental deed relating to the said alleged new shares, and stating that he could then have the share certificates for the same: That, in full faith and belief in the truth of the statements contained in the published reports and balance-sheets, and believing from the said circular that the said bank was authorized to allot and issue new shares, deponent, on or about the 27th of March, 1855,

called at the said head office, and there saw Mr. Gatherer, who then produced to him a document which he represented to be the supplemental deed relating to the said alleged new shares; and deponent then signed the said deed, and received from the said Mr. Gatherer the alleged certificates numbered from 1458 to 1462 inclusive, all dated the 27th of March, 1855, and each purporting to be a certificate that he was a proprietor of one share in the said bank: That, still in full faith in the truth of the statements contained in the said reports and balance-sheets, and in the said circular, deponent, in June, 1855, applied for six more of the said alleged shares; and, on the 8th of June, 1855, he paid to Mr. Craufurd, one of the officials of the said bank, at the head office of the said bank, the sum of 300*l.* for the alleged purchase-money of the said alleged new shares, and at the same time signed the document aforesaid, and received from the said Mr. Gatherer alleged share certificates numbered 2210 to 2215, both inclusive, dated the 8th of
*540] June, 1855, and each purporting to be a certificate that *deponent was the proprietor of one share in the said bank: That the said bank stopped payment on the 3d of September, 1856; and that, from information deponent had received since such stoppage, he for the first time ascertained that all the said reports and balance-sheets were utterly false and fraudulent, and that they were published in furtherance of a scheme concocted by the directors and managers of the said bank, or some of such parties, for fraudulently obtaining a more extended credit for the said bank, and for procuring money to be paid thereto in the way of additional capital: That the first information deponent received of the false statements contained in the said reports and balance-sheets was, from the proceedings at the meeting held on the 20th of September, 1856, after the stoppage of the said bank, at which meeting deponent was present; and, from the statements which were then made by Mr. Coleman, the accountant, and from information he had since received, deponent believed that the state of the assets of the bank was totally misrepresented in the whole of the said balance-sheets, and that a very large portion of the securities set down as good, were in fact, and were known to the said directors and managers, or some of them, to be, of little or no value; that a great amount of bad debts had previously been incurred by the said bank, and had been known to the directors and managers, or some of them, to have been so incurred, and to be bad, and had not been written off, but in such accounts were treated as good, and were also treated as bearing interest to the said bank, such interest forming a part of the pretended annual profits of the said bank, and being so treated in the said fraudulent accounts; and further that the said accounts were made out from books known by the directors and managers, or some of them, not to contain correct accounts of the assets and liabilities of the said bank; and deponent had also since ascertained, that, at

*the time he was induced to agree to take such alleged new shares as aforesaid, the said bank had lost the whole of its paid up [*541 capital, and a considerable sum in addition, and, so far from their having or ever having had any reserved fund, as was stated in the aforesaid reports and balance-sheets, and in its other reports and balance-sheets, was then, and had long been, in a condition of hopeless insolvency; and the deponent believed that such state of insolvency was then well known to the said directors and managers, or the principal part of them: That the deponent had also since the said 20th of September, 1856, ascertained, that, in order to induce the Crown to grant the supplemental charter under which the alleged new shares were alleged to have been issued, the said bank caused to be laid before the Board of Trade various reports and balance-sheets of the accounts of the said bank, and represented them to be true and faithful accounts of the various matters and things therein appearing, whilst in truth the said reports and balance-sheets were entirely false and fraudulent; and deponent verily believed, that, if a true statement of the affairs of the said bank had been laid before the said Board of Trade, the said supplemental charter would not have been granted: That deponent had since ascertained that the preliminaries required by the statute under which the said supplemental charter purported to be and could alone be granted, had not been complied with, and, in particular, that no previous deed had been executed and no payment made of at least 10 per cent. on the capital authorized previously to the issuing of the said supplemental charter; and deponent was advised and believed that the said alleged supplemental charter was from the beginning void and of no effect, and that there never was any authority for the issuing of the said alleged new shares by the said bank; and that, had he become acquainted with the several facts evidencing *fraud as aforesaid, or any of them, [*542 before he signed the said document as aforesaid, he would not have signed the same; and that, since he had become acquainted with such facts as aforesaid, he had repudiated the said purchase of alleged new shares; and he insisted that he was not in anywise a shareholder or member of the said bank in respect of the said alleged new shares, or any of them, or otherwise, nor liable to the debts or engagements of the said bank, or any of them, nor to contribute in respect of the same: That, on the 5th of December, 1856, the deponent carried into the Court of Bankruptcy a claim against the said bank for the said sum of 800*l.* for money had and received to his use by the said bank, for the alleged purchase-money of the said alleged new shares, and that such claim stood over for consideration:(*a*) And that he had not, nor had any one to his order or use, received the said 800*l.* or any security or satisfaction for the same, or any part thereof, but the whole of the said sum remained due and owing to him as aforesaid.

(*a*) It was ultimately rejected.

The memorial upon which it is sought to fix upon Mr. Beattie the liability of a shareholder, is not in the form prescribed by the statute: it does not refer to it at all; but refers to a totally different act, the 7 G. 4, c. 46. [CRESSWELL, J.—Suppose the memorial contained no reference to any statute, would that do?] It is submitted that it would not. The act must be complied with. [COCKBURN, C. J.—Is a shareholder to take advantage of the omission of the directors to do their duty, as against the general public? The shareholders come into the company with full knowledge of their liabilities.] So, the creditors are bound to know the provisions of the statute. They know that the shareholders are not to be affected by a memorial which does not *543] substantially *comply with the statute. The main question, however, in this case, is, whether a person who has been induced by the fraud of the directors to become a shareholder in a joint stock bank, and who the moment he discovers the fraud repudiates the transaction, by the mere act of so taking shares becomes liable for all the debts of the concern whenever contracted. One who becomes a partner in an ordinary banking concern, though induced to do so by fraud, becomes liable only for the debts contracted during the time he was a partner. For anything that appears, the debt for which this judgment was obtained might have been contracted before Mr. Beattie joined the concern. [CRESSWELL, J.—The 10th section of the 7 & 8 Vict. c. 113, imposes upon a shareholder a larger liability than that of an ordinary partner; and the 21st section fixes all whose names appear in the last-delivered memorial.] The 21st section cannot be taken literally; otherwise, every person whose name is in the memorial, however it may have got there, would be liable. [CRESSWELL, J.—Does it make any difference whether the fraud complained of was committed by the directors or by the vendor of the shares?] It may be that in the latter case the vendor would still be the shareholder. [COCKBURN, C. J.—Notwithstanding the substitution of the vendee's name in the memorial? CRESSWELL, J.—Do you deny that up to the time of the repudiation of his shares by Mr. Beattie, he was liable for the debts of the bank, and that the plaintiff might properly have resorted to him?] No. [COCKBURN, C. J.—Then, how can that vested right be divested by the subsequent repudiation?] Mr. Beattie ceased to be a shareholder the moment he discovered the fraud, and repudiated the transaction in the only way that was open to him. His repudiation, it is submitted, had the same effect as a transfer followed by a new memorial. [COCKBURN, C. J.—How can a creditor be affected by a secret transaction between *544] the *directors and the shareholder?] Burnes v. Pennell, 2 House of Lords Cases, 497, is a strong authority to show that such fraud as is disclosed upon the affidavit in this case would avoid the transaction. Lord Campbell there says,—p. 522,—"If the directors have made false representations for the purpose of fictitiously enhancing the price

of shares for their own benefit, and the appellant has thereby been deceived, and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside." In the case of The Deposit and General Life Insurance Company *v.* Ayscough, 6 Ellis & B. 761 (E. C. L. R. vol. 88),—where the question was whether a plea that the defendant, a shareholder, was induced to become a shareholder by the fraud of the plaintiffs, was a good answer to an action for calls,—the same learned judge, referring to Burnes *v.* Pennell, said: "I hope that the opinion I then expressed will be found to be correct, and that a shareholder induced to become such by the frauds of the directors, may get freed from his liability. I have myself no doubt that he may; but, to do so, *he must cease to be a shareholder.*" Here, the party *has* ceased to be a shareholder in the only way in which he could accomplish that object, viz. by repudiating his shares, and claiming to prove as a creditor against the estate of the bank. In the case of In re The Universal Provident Life Association, Ex parte Bell, 26 Law Journ. Ch. 137, where an insolvent company, by misrepresentation, induced a person to take shares, and to authorize the secretary of the company, as his attorney, to sign the deed of settlement on his behalf,—on the company being wound up, it was held that his name ought to be erased from the list of contributories. "In a complication of difficulties," says the Master of the Rolls, "with embarrassed finances, and while begging forbearance from a creditor, they publish a prospectus for the issue of fresh shares,—they invite parties *to become shareholders in consequence of the successful position of the company,—they knew this statement to be false. [*545 A person who takes shares in a company with the means of knowing the position of its affairs, ought to be held liable; but here Mr. Bell had no means of making himself acquainted with anything. He could not, except at a general meeting, ascertain the balance at the bankers', or whether the accounts were faithfully kept. The company was practically at an end, and it could not call in fresh parties to bear their losses." A similar doctrine is laid down by Wood, V. C., in the case of In re The Court Grange Silver Lead Company, De Castro's Case, 2 Jurist, N. S. 1203, and also in Ex parte Ginger, In re Tipperary Joint Stock Bank, 5 Irish Chan. Cas. 174. The question, at all events, is far too grave a one to be satisfactorily disposed of upon a summary application like this.

Lush and *Beasley*, in support of the rule.—The facts disclosed in Mr. Beattie's affidavit afford no answer whatever to the application. If the court entertain no judicial doubt, no considerations of supposed hardship will induce them to deprive the creditor of the right which the statute has given him. The 7th section provides, that, notwithstanding the incorporation of the company by letters patent, as mentioned in s. 6, "the several shareholders for the time being in the said banking business,

and those who shall have been shareholders therein, and their several executors, administrators, successors, and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the said company, *subject to the provisions hereinafter contained*, as fully as if the said company were not incorporated." What are "the provisions hereinafter contained?" The 9th section enacts "that every judgment, *546] decree, or order of any court of justice in any proceeding *against the company may be lawfully executed against and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The liability, therefore, imposed by the statute upon a shareholder, is larger than that which the law imposes upon an ordinary partner. But, by way of set-off, the 10th section, which enables the creditor to have execution against present or former shareholders, contains a proviso discharging the shareholder from all liability, after the expiration of three years from the time when he shall have ceased to be a shareholder. A person who becomes a shareholder is supposed to know all the liabilities he incurs by taking that step. And the 21st section in the most plain and distinct terms states who are liable as existing shareholders, viz. "the persons whose names shall appear from time to time in the then last-delivered memorial." The Chancery cases which have been referred to are entirely in favour of the applicant. Those upon the winding-up acts are altogether beside the question. Those acts were merely intended to provide a machinery to enable the partners to enforce contribution amongst themselves. [CRESSWELL, J.—And to enable the creditors to obtain payment of their debts; for which purpose very large powers are given to the official manager.] In Ex parte Ginger, In re Tipperary Joint Stock Bank, 5 Irish Ch. Cas. 174, it was laid down by the Master of the Rolls, that the proper test to apply in considering whether a party should be retained on the list of contributories under the joint stock winding-up acts, is, not whether he would be liable to the creditors of the bank if sued by them, but whether, having regard to the rights of the shareholders inter se, he ought to be *547] on the *list; and that a party may be liable at law to the creditors of the company, and yet should not be placed on the list of contributories, and, vice versâ, a party may not be liable at law to the creditors of the company, and yet ought to be placed on the list. It has repeatedly been held, that it is no answer to an action for a call, for the shareholder to say that he was induced by the fraudulent representations of the directors to become a shareholder. Thus, in Dodgson's Case, 3 De Gex & S. 85, it was held that directors fraudulently inducing a person to become a purchaser of shares in a company, may be personally liable to him, but they cannot be considered as the agents of the

body of shareholders to commit a fraud of this kind, nor is such a fraud a valid objection, the purchaser's name being on the list of contributories. The Vice-Chancellor (Knight Bruce) said in that case,—"I have held that liability to the creditors is quite distinct from the liability of contributories under the winding-up acts. The suggestion of fraud does not affect this case. No fraud is attempted to be fixed on the general body of shareholders. Whatever fraud there may be, if fraud there be, is charged against the directors, who cannot be the agents of the body of shareholders to commit a fraud." So, in Parbury's Case, 3 De Gex & S. 43, it was held that it is not sufficient ground for excluding an allottee from the list of contributories to a provisionally registered railway company, that the prospectus of the company contained incorrect and fraudulent statements, in reliance on which he applied for shares, or that the project was never carried into effect, unless it appear that the only other persons interested in the company were the persons who made the fraudulent statements. In The Deposit and General Life Insurance Company *v.* Ayscough, 6 Ellis & B. 761 (E. C. L. R. vol. 88), the plea was held bad on the same ground. Lord Campbell says, "It is now well settled that a contract tainted by fraud is not void, but *is only voidable at the election of the party defrauded. There is nothing on this record to show that the [*548 defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends; and he may have intended to do so." Here, that which is called a repudiation, is in truth only an attempt on the part of the shareholder to get back his money when he found he had been deceived. His equity, as the Master of the Rolls says in the case of In re The Universal Provident Life Association, Ex parte Bell, 26 Law J., Ch. 137, lies against those who made the misrepresentations by which he has been defrauded. Then, is there a sufficient memorial filed? No fraud is imputed in the memorial itself. The complaint is, that, by mistake, a wrong statute has been referred to. But there is no suggestion that the document does not contain all that in substance the act requires. The 16th section imposes the duty of making out the memorial upon the company. It clearly is not competent to one who is a shareholder in the concern to insist that the direction has not been properly complied with.

It being intimated to the court that similar questions were pending in the Courts of Queen's Bench and Exchequer, COCKBURN, C. J., said, that, under those circumstances, it would be better to allow this rule to be suspended, inasmuch as if the other two courts should come to the same conclusion, and make the rules there pending absolute, this court would probably concur with them; whereas, if there should be a difference of opinion between those courts, this court might think that a sufficient reason for directing a scire facias to issue.

Lush asked that the money might be brought into court.

*549] *CRESSWELL, J.—We cannot order that. It would in effect be telling the party that he must pay that price in order to induce the court to take time to deliberate. Cur. adv. vult.

COCKBURN, C. J., now said:—The court having disposed of the case of Dossett v. Harding, antè, p. 524, upon the authority of Henderson v. The Official Manager of the Royal British Bank, 3 Jurist, N. S. 111, we think the present case may be disposed of in the same way. We concur with the view of the Queen's Bench as to the question of fraud also.(a) The rule will therefore be made absolute, with costs.

*550] *CRESSWELL, J., referred to Palmer v. The Justice Insurance Society, 8 Jurist, N. S. 44. Rule absolute, with costs.

(a) Lord Campbell, in giving judgment in that case, said: "At the conclusion of the arguments, we entertained no doubt: but we were told that similar applications had been made to the Courts of Common Pleas and Exchequer, and that rules were pending in those courts; and we thought that upon a matter of this sort it would be as well if we had a conference with the judges of those courts before we pronounced our decision. That conference has taken place, and all the judges are unanimously of opinion that what the defendant has stated is no answer to the application. I thought from the beginning that the proposed answer could not be rested on any principle or decision, because this is an application by a creditor who on the faith of the party against whom it is made, that party being a shareholder, and having held himself out to the world as a shareholder, gave credit to the bank by depositing money with it. He has obtained judgment for the sum so deposited, and, there being no assets of the bank as a company, the application now is that execution may issue against this party as an individual shareholder. It would be monstrous, if, having become a partner in the bank, and held himself out to the public as a shareholder, and remained such until the bank stopped payment, he could get rid of his liability to the creditors of the bank by saying, 'I am no longer a shareholder: I have been defrauded.' Whether he can say that to other shareholders who were privy to the fraud, may be a question. Suppose this were a common partnership, and credit were given to the firm, and judgment were obtained upon an action brought against the firm, it would be no answer to the creditor, that the partner he sued was induced by the fraud of the other partners to become a member of the firm. That circumstance might be considered as between the partners inter se, but, as between the firm and a creditor, it is a matter wholly immaterial. The party here admits that he was a shareholder, and that he acted as such until the bank stopped payment. His name also appeared in the memorial of shareholders made out and registered under s. 16 of the 7 & 8 Vict. c. 113, and continues there. There is no doubt an irregularity in the memorial; but we are of opinion that all that is said in s. 16 as to the manner in which the memorial should be made out, is directory, and not conditional; and if a person's name appears on the list, it is, at all events, primâ facie evidence that he is a shareholder, notwithstanding the irregularity." And see Daniell v. The Official Manager of the Royal British Bank, 1 Hurlst. & N. 681.†

The question whether a shareholder whose name appears in the last-filed memorial, but whose shares have been duly transferred to a bonâ fide purchaser before the commencement of the action in which judgment against the bank is obtained, is liable to an execution as an "existing shareholder," is still sub judice,—this court having in two cases of Fry v. Harding and Edwards v. The Kilkenny and Great Southern and Western Railway Company, in Easter Term, 1857, directed writs of scire facias to be issued, and the facts to be turned into a special case.

*BENDY *v.* HARDING, Official Manager of THE ROYAL BRITISH BANK. *Jan.* 30. [*551

It is no objection to the notice of an intended application against a shareholder, under the 7 & 8 Vict. c. 113, that it intimates an intention to apply "to the court *or* to a judge thereof."

JUDGMENT having been obtained by the plaintiff for 687*l.* in an action against Harding as the official manager of The Royal British Bank, a summons was taken out (upon affidavits substantially the same as those in Dossett *v.* Harding, antè, p. 524), calling upon one John O'Kines, a shareholder, to show cause at chambers why execution should not issue against him.

This summons came on for hearing before Willes, J., on the 21st instant, when, it being objected on the part of O'Kines that the notice of the intended application, pursuant to the 13th section of the 7 & 8 Vict. c. 113, was bad, inasmuch as it stated that the application would be made "to this honourable court, *or* to a judge thereof," that learned judge made the following order:—

"Upon hearing counsel for plaintiff and for Mr. John O'Kines, on the application of plaintiff to issue execution against said John O'Kines pursuant to the summons of the Hon. Mr. Justice Crowder, dated the 14th of January instant, and issues herein, I dismiss the same with costs, to be taxed, such costs to be deducted from plaintiff's claim upon the judgment herein, if a successful application against the said John O'Kines be made to the court within a month: if no such application be made, then I order that the said costs be paid by the plaintiff to the said John O'Kines: and I certify for counsel."

Lush, on a former day in this term, obtained a rule nisi to rescind that order, and for leave to issue *execution against O'Kines for [*552 687*l.* debt, and 7*l.* 8*s.* 10*d.* costs, with costs of the application.

Byles, Serjt., and *Dowdeswell*, now showed cause.—The single question in this case is, whether a notice, in the alternative, of the plaintiff's intention to apply to the court *or* a judge, is a good notice. It is submitted that it is not. The party to be called upon has a right to know which of the two modes of proceeding the plaintiff intends to adopt. When this matter was before the learned judge at chambers, reliance was placed upon a case of Corder *v.* The Universal Gas-Light Company, 6 C. B. 190 (E. C. L. R. vol. 60), the marginal note of which states the court to have decided that the notice must show whether the application is intended to be made to the court or to a judge at chambers: but, upon examination, it will be found that the point really decided there was, that the notice, having already been exhausted by an application to chambers, could not be made the foundation of a motion in court for the same purpose. [COCKBURN, C. J.—What advantage would it be to the party to have a notice in the form you suggest?] He knows that the court sits only during term time; and, if the notice is of an intention to

apply to the court, he may give notice of his intention to show cause in the first instance. It is analogous to the notice of action which the statute 24 G. 2, c. 44, requires to be given to a magistrate: it has been decided over and over again that such notice is bad unless it states the court in which the action is to be brought. The object in each case is, that the party shall have a given time within which to determine whether to pay the money (or tender amends) or to prepare to resist the proceeding; and, in order to do that, he should have distinct notice of the nature of the proceeding, and the place where it is to be taken. [WILLES, *553] J.—Suppose two *separate notices are given, one for application at chambers the other to the court?] In that case, the last served would be the operative notice. [CROWDER, J.—Suppose both served together?] That would in effect be the same as this casa.

Lush and *Beasley*, in support of the rule.—The 13th section of the 7 & 8 Vict. c. 113, provides that "no such motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby." The notice need not state to which tribunal the application is intended to be made. There is no analogy whatever between a case under this act and that of a notice of action to a magistrate. If notice be given under the statute 24 G. 2, c. 44, of an intention to bring an action in this court, and the action is brought in another court, that is not a notice of *the action*. Has not the party in this case had due notice of the application to the court? There can be no possible inconvenience in this. He will know where the application is made when he is served with the summons or the rule. It would be frittering away the provisions of the act, to hold this notice to be insufficient. The matter has already been under the consideration of more than one of the judges at chambers; for, in a case of Cotton v. The Official Manager of the Royal British Bank, before Willes, J., that learned Judge, after taking time to consult another of the judges, held the objection to be invalid. [WILLES, J.—I recollect the case. I consulted my Brother Cresswell, and we thought there was nothing in the objection.]

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. All that the legislature can upon any sound principle of construc- *554] tion be considered *as having required, is, that, before the powers vested in the court or a judge are put in motion, there shall be a ten-days' notice given to the party to be charged, that leave to issue execution against him is intended to be applied for: and, if a notice be given in the form here adopted, viz. of an intention to make the application "to the court or to a judge thereof," that is a sufficient notice. The justice of the case is clearly in favour of the applicant: but, as this is a motion to set aside a judge's order, the rule will be absolute without costs.

The rest of the court concurring, Rule absolute accordingly.

In the Matter of THOMAS SIMPSON.

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court:"—The court required it to be amended.

ON a former day in this term, Mr Simpson obtained a rule to strike him off the roll of attorneys of this court, at his own request, with a view to his being called to the bar. He had previously obtained a similar rule in the Queen's Bench; but that rule was rescinded before it was acted upon.

R. Hall now moved to restore him to the roll upon an affidavit stating that he had abandoned his intention of going to the bar, and was desirous of resuming his practice as an attorney. The affidavit, however, was intituled "In the matter of Thomas Simpson, gentleman, one of the attorneys of Her Majesty's Court of Common Pleas," and he was so described in the body of it, although the rule for striking him off the roll of this court had been acted upon.

THE COURT required the affidavit to be amended and re-sworn, and the rule was then Granted.

*THOMPSON *v.* HARDING, Official Manager of THE ROYAL BRITISH BANK. *Jan.* 31. [*555

In the notice of the intended application against a shareholder under the 7 & 8 Vict. c. 113, the party was described as "John Marshall." In the memorial last filed he was described as "John S. Marshall." There was an affidavit of identity:—Held, that the notice was sufficient.

JUDGMENT having been obtained by the plaintiff for 142*l.* 10*s.* 9*d.* debt, and 5*l.* 11*s.* 10*d.* costs, in an action against Harding as the official manager of the Royal British Bank,

Hawkins, on a former day in this term, upon affidavits similar to those used in Dossett *v.* Harding, antè, p. 524, obtained a rule calling upon James Beech Hill and John Marshall respectively to show cause why execution or executions upon the said judgment should not be issued against the persons, property, and effects of the said James Beech Hill and John Marshall respectively as shareholders of the said bank, to satisfy the plaintiff in the sum of 109*l.* 5*s.* 3*d.* remaining due in respect of the said judgment, with interest and costs.

Byles, Serjt., showed cause.—He admitted that the case was not to be distinguished from that of Powis *v.* Harding, antè, p. 533; but took an objection to the notice, which described Marshall as "John Marshall," whereas his true name, and the name by which he appeared on the return made to the stamp-office in June last, was "John S. Marshall."

There was, however, an affidavit identifying the party served with the notice as the person mentioned in the return; and the rule was made Absolute.

*556] *GRISSOLD v. HARDING, Official Manager of THE ROYAL BRITISH BANK. *Jan.* 31.

Where a rule cannot be served, it may be amended and enlarged, even though it has run out.

In this case, which was similar to the last, the plaintiff's attorneys had been unable to serve the party to whom the notice was addressed, by reason of his having left his former place of abode.

Byles, Serjt., applied for leave to amend the rule, and to enlarge it, until the first day of the next term.

Cresswell, J.—How can we so deal with a rule, after it has run out?

Master *Park* stated that he had ascertained that that which was asked was commonly done in the Court of Queen's Bench.

Cresswell, J.—For the purpose of service?

Master *Park*.—Yes: it is treated as in effect a new rule.

The rule was accordingly ordered to be amended and enlarged.

*557] *BAILEY and Another v. THE UNIVERSAL PROVIDENT LIFE ASSOCIATION. *Jan.* 31.

One who has accepted shares in a joint stock company, but *has not signed the deed of settlement*, or any deed referring to it, is not a "shareholder" within the 7 & 8 Vict. c. 110, and consequently is not liable to an execution at the suit of a judgment-creditor of the company,—although his name appears as a shareholder in the return filed with the registrar of joint stock companies, pursuant to s. 11.

Hawkins, on a former day in this term, obtained a rule calling on Edward Copeland to show cause why execution should not issue against him as a shareholder in the Universal Provident Life-Association.

The affidavits upon which the motion was founded stated, that the plaintiffs obtained a judgment against the association on the 4th of September, 1855, for 750*l.* 11*s.* 4*d.* debt, and 48*l.* 8*s.* 8*d.* costs, of which there remained due 735*l.* 7*s.* and interest; that, on the 1st of November, 1855, a fi. fa. was sued out upon the said judgment, and returned nulla bona; that the defendants had not any goods or chattels, property or effects applicable to the said execution, or whereby the said debt and costs, or any part thereof, might be satisfied; that proceedings were pending before the Master of the Rolls for winding up the affairs of the association, but that no call had been made thereunder; that the plaintiff's claim upon the judgment had been duly proved under the petition and order pursuant to the Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45, s. 73); that, on the 26th of November, 1856, Mr. Copeland was duly served with notice of the intended application, pursuant to the 7 & 8 Vict. c. 110, s. 58; that, in and by the registered returns of the said Universal Provident Life-Association,

made pursuant to the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, ss. 4, 11, and kept at the proper office, the said Edward Copeland was returned as a shareholder in the said company at the time when the said debt for which the action was brought was incurred and the judgment thereon was obtained as *aforesaid, and still remained a shareholder therein, no transfer of his shares having been registered or returned to the said office; and that the said association was a completely registered company, and was not incorporated by act of parliament or charter, nor was the liability of its members restricted by letters patent or otherwise. [*558

Bolton and *Mellish* now showed cause.(a)—Although Mr. Copeland is a

(a) The affidavits upon which cause was shown, stated, that the transfers under which Mr. Copeland held six shares in the association were not sealed, nor were they endorsed with a certificate of approval under the hands of two directors, as required by the deed of settlement, and that the date of one of the transfers was written in pencil; and that he had never signed the deed of settlement of the association. The following clauses of the deed of settlement were also set out:—

Clause 66. "That the person appearing in the company's register of shareholders to be holder of any share, and no other person, shall be entitled (subject to the regulations and in the manner herein expressed) to sell and transfer any such share to any person whomsoever not being an infant, lunatic, married woman, or under any legal disability, and to any body politic or corporate legally capable of holding any such share: Provided, nevertheless, that it shall not be obligatory on the board to accept a transferree who shall be the holder of less than five shares in the capital of the company:"

Clause 67. "That a form of deed of transfer shall be provided by the directors, and that any shareholder shall be entitled, on application to the secretary of the company, to have a copy of such form, with printed or written instructions for the use of the same, if any shall be thought requisite:"

Clause 68. "That every deed of transfer shall, immediately after execution, be left at the company's offices; and thereupon the directors shall, with all convenient speed, take the same into consideration, and, subject to the proviso contained in the 66th clause, shall, if the same be found to be in accordance with the said form, and also in the opinion of the directors a fit and proper instrument of transfer within the provisions of the statute in that behalf made and provided, and in accordance with the provisions of these presents, on payment of 1*s.* in respect of such transfer, *certify their approval of the same in writing under the hands of some two of the directors to be endorsed thereon*:"

Clause 69. "That any transfer, or pretended transfer, of shares, not being approved by the directors under the last-preceding clause, shall be absolutely void, and the then registered holder of the shares therein expressed to be transferred shall continue to be the shareholder in respect thereof to all intents and purposes; and notice of such non-approval, and of the consequences thereof as aforesaid, shall forthwith be sent to the shareholder purporting thereby to transfer such shares:"

Clause 70. "That, in case such transfer shall be approved, but not otherwise, the directors shall forthwith cause a notice in writing to be sent to the transferree, apprising him of the same, and requiring him to come in and execute this present deed, or some deed of covenant referring thereto, or a duplicate thereof, within one calendar month from the date of such notice, which shall also specify the penalities and disabilities affixed to the non-execution of the deed of settlement of the company; but it shall be in the discretion of the board to extend that period to a time not exceeding three calendar months, when the circumstances of the case shall in their opinion justify the same:"

Clause 80. "That any person who shall become entitled to any share by purchase, representation, or otherwise, and who shall then be a registered shareholder of the company in respect of any other share, shall not be required again to execute these presents, or any deed referring thereto, but shall be entitled, on leaving the requisite transfer, or giving the requisite notice, and leaving the requisite evidence, and making the requisite election (if any of such particulars are respectively necessary), in the manner hereinbefore required, to be immediately entered in the register of shareholders as the holder of the said shares:"

Clause 81. "That, in case any person who shall have been required under the 70th or 77th

holder of shares in the association, and his name appears on the register
*559] of shareholders, he is *not legally a shareholder, or liable in that character, inasmuch as the shares have not been conveyed to him by a valid transfer, and he has not executed the deed of settlement. This is a proceeding under the 66th section of the act for the registration, incorporation, and regulation of joint stock companies, 7 & 8 Vict.
*560] c. 110.(*a*) By the *interpretation clause (s. 3), the word "shareholder" is declared to mean, "any person entitled to a share in
*561] the *company, and *who has executed the deed of settlement*, or a deed referring to it." The provision for the transfer of shares is contained in s. 54, which enacts, that, "*subject to the regulations* therein contained, and to be *contained in any deed of settlement* of any

clause of these presents to execute these presents, or some deed of covenant referring thereto, or duplicate thereof, shall for the space of three calendar months neglect to execute the same in the manner in such notice specified, or, in case any person claiming on the ground of any evidence required to be left under the 74th clause of these presents, shall for the space of six calendar months after the event upon which his or her title depends neglect or be unable to procure and leave valid and sufficient evidence as required by the said 74th clause, or if for any reason whatsoever no such evidence shall be left within the time last aforesaid by the party legally entitled to leave the same, then and in every such case the share or shares of or claimed by any such person making such default, or so unclaimed as aforesaid, shall be immediately and irrevocably forfeited to the use of the company:"

Clause 82. "That, immediately upon the execution of these presents, or such deed of covenant referring thereto, or duplicate thereof, in manner aforesaid, the person executing the same being a person duly entitled by original subscription, or by transfer, election, nomination, or otherwise, in manner hereinbefore mentioned, shall be forthwith entered on the register of shareholders, and duly entered for registration under the provisions of the statute; and such person shall forthwith, but not before, assume the liabilities and privileges of a shareholder; and, if such person shall be entitled in any of the respective capacities aforesaid, or as a nominee of any party so entitled, the dividends accruing on the share or shares to which such party or nominee of such party shall have been so entitled after the event on which such title shall have accrued, and before the execution of these presents, or deed referring thereto, or duplicate thereof, shall, unless forfeited under the 79th clause of these presents, be accumulated for and paid to the person so executing, at the time of such execution; but, in cases of direct transfer, the former holder of the share in respect of which such execution is to be made, shall, until such execution and registration as aforesaid, continue subject to all the liabilities, and be entitled to the dividends, and all other privileges of a shareholder."

(*a*) Which enacts "that every judgment and every decree or order which shall be at any time after the passing of this act obtained against any company completely registered under this act, except companies incorporated by act of parliament or charter, or companies the liability of the members of which is restricted by virtue of any letters patent, in any action, suit, or other proceeding prosecuted by or against such company in any court of law or equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also, if due diligence shall have been used to obtain satisfaction of such judgment, decree, or order, by execution against the property and effects of such company, then against the person, property, and effects of any shareholder for the time being, or any former shareholder of such company in his natural or individual capacity, until such judgment, decree, or order shall be fully satisfied: provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement for which such judgment, decree, or order may have been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree, or order being obtained: provided also that in no case shall execution be issued on such judgment, decree, or order, against the person, property, or effects of any such former shareholder of such company, after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company."

joint stock company completely registered under this act, it shall *be lawful for every shareholder of such company, and he is hereby [*562 entitled, to sell and transfer his shares therein *by deed, duly stamped*, in which the pecuniary consideration for such sale shall be truly expressed, and which instrument of transfer must be according to the form in the schedule (K.) to this act annexed, or to the like effect; and that the directors of the company shall cause a memorial of such instrument of transfer, when produced at the office of the company, to be entered in a book to be called 'The Register of Transfers,' and the entry thereof to be endorsed on the instrument of transfer; and that, until such instrument of transfer shall have been so produced at the office of the company, the purchaser of the share shall not be entitled to receive any of the profits of the company, or to vote in respect of such share." The affidavit shows that the regulations contained in the deed of settlement in this case have not been complied with; consequently there has been no valid transfer. The deed requires a certificate of approval, under the hands of two directors, to be endorsed on the instrument of transfer. This regulation has not been complied with. The material provisions as to the registration of transfers contained in the act, will be found in ss. 11, 13, and 18. By the former, the directors are required to make the following returns to the registrar of joint stock companies, viz. a return according to schedule (E.), containing the particulars therein set forth of every transfer of any share in such company which shall have been made since the preceding half-yearly return (or, in the case of the first of such returns made by such company, since the complete registration thereof), and which shall have come to the knowledge of the directors; and also a return according to schedule (F.), containing the particulars therein set forth of the names and places of abode of all persons who shall either have ceased to be shareholders of such company, or have become shareholders of such *company otherwise than by a transfer as aforesaid, since the preceding half-yearly return, or since the complete registration [*563 of the company, as the case may require, and also of the changes in the names of all shareholders of such company whose names shall have been changed by marriage or otherwise since the last preceding half-yearly return, or since the complete registration of the company, as the case may require. The 13th section enacts, "that, until the return of the transfer or other fact or event whereby a person becomes the holder of any shares, be made pursuant to the provisions hereinbefore contained, it shall not be lawful for such company, its directors or officers, if such fact or event be known to them respectively, to pay to any such person any part of the profits of the concern, nor for any such person to sue for or recover any part of the profits arising in respect of such share, or in anywise to act as a shareholder; and that, until the return of the transfer of any share shall have been made pursuant to the provisions hereinbefore contained, the person whose share shall have been thereby

transferred, shall, so far as respects his liability to the debts and engagements of the company, and also as respects the reimbursement of any loss, damages, costs, and charges he may incur thereby, be deemed to continue a shareholder of such company." And s. 18 enables any person to inspect and obtain a copy or extract of any return or deed, certified by the registrar, and provides, "that, in all courts of law and equity, and elsewhere, every such copy or extract so certified *shall be received in evidence*, without proof of the signature thereto, or of the seal of office affixed thereto." This provision differs widely from that contained in the 21st section of the 7 & 8 Vict. c. 113, which would seem to make the return *conclusive* evidence of the parties named therein being shareholders. Both statutes being under the consideration of the
*564] legislature during the *same session, this difference of language could hardly have been unintentional. There are numerous cases where it has been held, that the transferree of shares is not to be considered a shareholder unless the terms of the deed have been complied with. In The Galvanized Iron Company *v.* Westoby, 8 Exch. 17,† 7 Railway Cases, 318, it was held that the defendant was not liable to be sued for calls, he never having executed the deed of settlement. So, in Moss *v.* The Steam Gondola Company, 17 C. B. 180 (E. C. L. R. vol. 84), a party who had *acted as a director*, but who had not signed the deed of settlement, was held not liable to an execution on a judgment against the company. Jervis, C. J., there says: "You are asking for a statutory remedy against a shareholder. To entitle you to that, you must bring the party sought to be charged within the statutory definition. That you have not done." Again, in Wilkins *v.* The Anglo-Californian Gold Mining Company, 18 Q. B. 728 (E. C. L. R. vol. 83), a person who had subscribed for shares was held not to be entitled to certificates under s. 51, until he had executed the deed of settlement, or a deed referring thereto. In Bosanquet *v.* Shortridge, 4 Exch. 699,† a transfer was held inoperative for want of the consent thereto of "a board of directors," as required by the deed of settlement.(*a*) In Ness *v.* Angas, 3 Exch. 805,† the husband of a woman who had (with his consent) purchased shares in a joint stock bank with the proceeds of her separate property, not having complied with the requisitions of the deed of settlement so as to become a member of the association, was held not liable to a scire facias under the 7 G. 4, c. 46, s. 13. The like was held as to an executor, in Ness *v.* Armstrong, 4 Exch. 21.† To make a man a shareholder, the statute requires four things,—that he
*565] should have executed the deed of settlement *of the company, or some deed referring to it,—that the shares should be conveyed to him by deed duly stamped,—that a memorial of the instrument of transfer should be entered in "the register of transfers," and the entry endorsed thereon,—and that his name should appear in the return made

(*a*) See the observations upon this case in Bargate *v.* Shortridge, 5 House of Lords Cases, 297.

to and filed with the registrar of joint stock companies. The three first have not been complied with here: and the question is, whether the single fact of the party's name appearing on the register fixes him with liability as a shareholder. In Turner *v.* The Metropolitan Live-Stock Company, 2 Exch. 567,† the return was held to be primâ facie evidence only.

Hawkins, in support of his rule.—The question is whether the shareholder is not estopped from setting up the irregularity, if any there be. The object of the legislature in requiring a memorial or return to be filed, is, to give to persons dealing with the company the means of ascertaining with whom they are contracting. The case of Turner *v.* The Metropolitan Live-Stock Company, 2 Exch. 567,† is expressly in point. Mr. Copeland's affidavit shows that he has done all he could to make himself a shareholder. The transfer is in the form given in the schedule, though by accident there is no seal opposite the signature of the transferror. [COCKBURN, C. J.—It amounts to no more than this, that the parties intended the instrument to be a deed.] In equity it would still be treated as a conveyance. Having taken advantage of it as a valid deed, and having by means of it caused his name to be inserted in the register, is not the party, as between himself and a creditor whose only means of information is by looking at the register, estopped from saying that he is not a shareholder? The only effect of the omission to sign the deed of settlement, is, to suspend the party's right to [*566 *exercise the powers of a shareholder: s. 26.(*a*) [CROWDER, J.—You argue, from s. 26, that, although not a shareholder for the purpose of receiving benefit, by reason of his omission to execute the deed, the party *is* a shareholder for the purpose of being liable.] Just so: and there is no good reason why it should not be so. [COCKBURN, C. J.—When you come to put in force the very stringent provisions of the statute, must you not show clearly that the statutory liability is imposed upon the person sought to be affected? CRESSWELL, J.—Suppose the legislature had said that execution might issue against every person who signs the company's deed of settlement,—would you contend that a shareholder who has not executed the deed would be liable?]

(*a*) Which enacts "that no shareholder of any joint stock company completely registered under this act shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement of the said company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall have been registered in the registry office aforesaid; and, further, that it shall be lawful for every shareholder who shall have signed such deed, and paid up such instalments or calls, and shall have been registered, and he is hereby entitled,—to be present at all general meetings of the company,—and also to take part in the discussions thereat,—and also to vote in the determination of any question thereat, and that either in person or by proxy, unless the deed of settlement shall preclude shareholders from voting by proxy,—and also to vote in the choice of directors, and of every auditor to be elected by the shareholders; subject, nevertheless, to the provisions of this act and of the deed of settlement of the company, or other special authority, so far as such provisions shall either regulate or restrict the exercise of such powers, but not so as to deprive such shareholders thereof," &c.

No. [CRESSWELL, J.—Do they not in effect exclude the liability of
*567] one who has not signed the deed, when they *say, that, certain conditions having been complied with, execution may issue against shareholders, and that, by "shareholders," they mean persons who have executed the deed? I think we cannot hold a man to be a shareholder, and as such liable to execution, who has not signed the deed, without overruling Moss v. The Steam Gondola Company, 17 C. B. 180 (E. C. L. R. vol. 84), which I think was rightly decided.] In Burnes v. Pennell, 2 House of Lords Cases, 497, by a deed of copartnership of a joint stock company, certain forms were to be observed by any transferree of shares, before he could become a member of the company. A. purchased shares, and executed some of the acts required to constitute him a member of the company, but left one of these acts unexecuted: and it was held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract.

COCKBURN, C. J.—It appears to me to be enough upon the present occasion to say that Moss v. The Steam Gondola Company is an authority directly in point. The plaintiff is seeking to enforce a judgment obtained against the company, by means of a statutable execution against one whom he charges to be a shareholder. I quite agree with the principle laid down in the case referred to, viz. that the party against whom this very stringent proceeding is taken, must be shown to come within the definition of a shareholder given by the act,—one who has executed the deed of settlement of the company, or some deed referring thereto. Mr. Copeland in this case has not executed the deed; consequently, he is not a shareholder, and the plaintiff cannot have execution against him. The rule which has been obtained for that purpose must be discharged.

*568] *The rest of the court concurring,

Rule discharged.

Hawkins submitted, that, inasmuch as the rule was not an experimental one, and the creditor had been misled by the appearance of the name of Mr. Copeland in the return of shareholders, he ought not to be visited with costs.

To this the court assented, and the rule was

Discharged without costs.

BARNES *v.* HARDING, Official Manager of THE ROYAL BRITISH BANK.(*a*) *May* 8.

Upon an inquisition on a writ of elegit, proof of possession or receipt of the rent of the land by the party, is primâ facie evidence of title.

Where a jury, notwithstanding such evidence, found that the party had no lands,—the court set aside the finding, and directed the sheriff to take a new inquisition.

A WRIT of elegit was directed to the sheriff of Suffolk, commanding him to cause to be delivered to the plaintiff, by a reasonable price and extent, all the goods and chattels of Thomas Mayhew, of Saxmundham, in the said county, in his bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in his bailiwick, as the said Thomas Mayhew, or any person in trust for him, was seised or possessed of on the 30th of January, 1857, or at any time afterwards, or over which the said Thomas Mayhew on that day, or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit,—to hold the same until the sum of 116*l.* *19*s.* 2*d.*, together with interest, should have been levied. [*569

An inquisition under the above writ was held on the 2d of April last, at Woodbridge, in the county of Suffolk, before James Sparke, Esq., the acting under-sheriff, when a jury was duly sworn, and the following evidence given, after an objection taken by Mr. Churchyard, an attorney who attended to watch the proceedings on behalf of Mr. Mayhew, instructed by Mr. Mayhew's London agents (but afterwards withdrawn), that the deeds ought to be produced, or notice to produce given before secondary evidence could be let in:—

The first witness, Mr. Garrett, of Aldborough, stated that he knew the property of Mr. Thomas Mayhew at Aldborough; that it was comprised in the particulars and plan produced, and consisted of houses and about fifty acres of land (enumerating and describing the parcels) called the Crespigny House Estate; that the witness occupied a great portion of it, about twenty-five acres, holding it as tenant from year to year of Mr. Mayhew, and paying rent to him for it; that the property was Mr. Mayhew's on the 30th of January and the 23d of February last; that he (the witness) had offered, and was willing to give, 5000*l.* for the whole estate; and that the price asked was 6000*l.*

On cross-examination, Mr. Garrett stated that Mr. Mayhew always called the estate his own; that he paid him no rent since last January, there being none due; that no one else claimed the rent; but that he had that day received a notice from one Thrupp, who claimed to be a mortgagee, to pay no further rent to Mr. Mayhew.

(*a*) The rule was also intituled "And in the matter of the writ of elegit against the lands of Thomas Mayhew."

An extract from the rate-book of the parish of Aldborough was produced, and admitted, showing the gross rental of the estate to be 182*l.* and the rateable value 174*l.*

*570] James Southwell, of Saxmundham, was next called. *He stated that he knew the property of Mr. Mayhew in Saxmundham, called The Fairfield Estate; that it was entirely in his own occupation, with the exception of a small quantity let out as garden ground, —the whole consisting of about twenty-eight acres, and the annual value 117*l.* 10*s.*

On cross-examination, this witness stated that he knew of the possession only by repute, by inspection of the rate-book, and by his (Mr. Mayhew's) residence and occupation.

The under-sheriff told the jury, that, in his opinion, the evidence produced was under the circumstances admissible and sufficient; that that question was not for their consideration; but that they were to say, upon the evidence produced, what lands, &c., Mr. Mayhew was possessed of.

The jury found that there was *no evidence* to show that the defendant (meaning Mayhew) was possessed of any lands, &c.

Couch, on a former day, upon an affidavit of the under-sheriff verifying his notes, moved for a rule calling upon Mr. Mayhew to show cause why the inquisition taken upon the above writ of eligit should not be set aside and a new inquisition taken thereon, on the ground that the verdict was perverse. He referred to Watson's Sheriff, 2d edit. 313, where it is said, that, "where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ,"—citing 2 Inst. 396. [CROWDER, J.—Can you have a new inquisition upon the old writ? CRESSWELL, J.—Why not, as well as upon a writ of inquiry?]

The rule was granted in the alternative,—"to show cause why the *571] finding of the jury upon the inquisition *taken upon the said writ should not be set aside and a new inquisition be taken thereupon, or why the said writ of elegit and the inquisition thereon should not be set aside, and the plaintiff be at liberty to issue a new writ of elegit against the lands of the said Thomas Mayhew."

Hawkins now showed cause.—It cannot be denied that there was evidence upon which the jury might, and perhaps ought, to have found that Mr. Mayhew had lands in the county which might be extended under the elegit. But it is submitted that this rule was wholly unnecessary, inasmuch as the plaintiff might have issued another elegit: Archbold's Practice, 11th edit., by Prentice, 634, 635.(*a*) [CRESSWELL, J.

(*a*) In Archbold's Practice, 633, it is said: "Proof of possession of the land by the defendant, or receipt of rent by him in respect of the same, is primâ facie evidence of his title to it. As the proceeding is an ex parte one, and the inquisition not conclusive on the defendant, it is in general sufficient to give slight evidence of the defendant's title." "The inquisition must find

—Into the same county?] Yes. [CRESSWELL, J.—Without the leave of the court?] Yes. [CRESSWELL, J.—If he may have a new elegit without leave, does he make it worse by asking leave? WILLES, J.—It may be convenient to the plaintiff to have a declaration of the court that there was evidence upon the former occasion upon which the jury should have found that Mr. Mayhew had lands. COCKBURN, C. J.—If the court are satisfied that the verdict was wrong, I do not see why they should not say so.] At all events, *the plaintiff ought not to have the costs of the rule. [CRESSWELL, J.—Mr. Mayhew [*572 appeared by his attorney to oppose the plaintiff's proceedings on the inquisition. I do not see, therefore, why he should not be visited with costs.](a)

Byles, Serjt., and *Couch*, contrà, were stopped by the court.

COCKBURN, C. J.—The finding of the jury was altogether unwarrantable. The rule must, therefore, be made absolute.

WILLES, J.—The jury upon an inquisition under an elegit, have no right to go into the question of title. The return to the elegit does not conclude the matter. The jury were bound to find that Mr. Mayhew had lands, upon the primâ facie evidence produced before them. It may, however, be advisable for the plaintiff to take the rule in the second alternative.

Byles, Serjt.—We have considered the matter, and prefer taking the first alternative. The writ has not been executed; that which has been done upon it going for nothing. We wish to set aside the inquisition only.

WILLES, J.—Then you must add to the rule, a direction to the sheriff to take a new inquisition.

The rest of the court concurring,

Rule absolute.(b)

the lands with certainty; the place and county where they lie, and where the inquisition is taken,—Raysing's Case, Dyer, 298; the estate the defendant has in them,—F. Moore, 8; whether seised in severalty, or as joint-tenant or tenant-in-common,—Heard v. Baskerfield, Hutton, 16, Brownl. 38; and their value,—Sparrow v. Mattersock, Cro. Car. 319."

(a) The rule did not ask for costs.

(b) The rule was drawn up as follows:—"It is ordered that the finding of the jury upon the inquisition taken upon the said writ of elegit be set aside, and that the sheriff of the county of Suffolk do proceed to take a new inquisition thereon."

*573] *Ex parte THOMAS CROSS, a Prisoner. *Jan.* 22.

A commitment under the Vagrant Act, 5 G. 4, c. 83, s. 4, stated that "T. C., on, &c., in this city (London), then being a reputed thief, *frequenting* the public streets and places of and in the said city, then and there *was found* in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal," &c. :— Held, sufficient.

THE prisoner Thomas Cross was on the 30th of December last committed to the house of correction at Holloway, for an offence against the Vagrant Act, 5 G. 4, c. 83, s. 4, under the following warrant:—

"To all and every the constables of the police force for the city of London and the liberties thereof, and to all other constables and peace officers in the said city and liberties, and to the keeper of the city of London house of correction at Holloway, in the county of Middlesex.

"London, to wit. Whereas, Thomas Cross, late of London, labourer, was this day duly convicted before the undersigned, the Lord Mayor of the city of London, and one of her Majesty's justices of the peace in and for the said city and the liberties thereof, sitting at the Mansion House justice-room in the same city, of being a rogue and vagabond, within the intent and meaning of the statute of the Fifth year of King George the Fourth, intituled 'An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England,' For that he the said Thomas Cross, on the 24th day of December instant, in this city, then being a suspected person and reputed thief, *frequenting* the public streets and places of and in the said city, then and there *was found* in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal the moneys, goods, and chattels of Sarah Seymour from her person therein, against the form of the statute in such case made and provided: And it was thereby adjudged that the *574] said Thomas *Cross, for his said offence, should be imprisoned in the city of London house of correction at Holloway aforesaid, and there kept to hard labour, for the space of three months: These are, therefore, to command you, the said constables, to take the said Thomas Cross, and him safely convey to the said house of correction at Holloway aforesaid, and there deliver him to the keeper thereof together with this precept: And I do hereby command you the said keeper of the said house of correction to receive the said Thomas Cross into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of three months: And for your so doing this shall be your sufficient warrant.

"Given under my hand and seal, this 30th day of December, 1856, at the Mansion House justice-room aforesaid.

"THOMAS D. FINNIS, Mayor, &c."

MacOubrey moved for a habeas corpus to bring up the prisoner to be

discharged from custody, on the ground of the illegality of the conviction. He stated that a similar application had been already made to the Court of Exchequer, and they thought the conviction right. The conviction was under the 5 G. 4, c. 83, s. 4. There are only two branches of the section under one of which the case could fall, viz. those which enact that "every person being found in or upon any dwelling-house, warehouse, coach house, stable, or outhouse, or in any enclosed yard, garden, or area, for any unlawful purpose," and that "every suspected person or reputed thief *frequenting* any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any street, highway, or place *adjacent, with intent to commit felony," shall be deemed a rogue and vagabond, within the true intent and meaning of the act. Now, the conviction could not have been intended to be under the first branch, because "Railway Place" is not stated to be a place of the description there mentionod. It must, therefore, have been intended to be under the last: but it does not allege that the prisoner was "frequenting" Railway Place, but merely that he was found there: consequently, it does not allege any offence to have been committed at all. [CRESSWELL, J.—What do you understand by "frequenting?"] Being there more than once or twice. Dr. Johnson defines it, "To visit often; to be much in any place; to resort often to." [CRESSWELL, J.—If you are right, it would be necessary to show that the man was there more than once *with the same intent*, viz. to commit a felony.] In Ex parte Elizabeth Jones, 16 Justice of the Peace, 298, A. was committed as a rogue and vagabond under this section, for that she, being a suspected person, did unlawfully frequent a certain street called Regent Street, in the county of Middlesex, with intent to commit felony: and it was held that she was entitled to be discharged on a writ of habeas corpus, because the commitment was insufficient, for omitting to state that the street in question led to a canal, &c., or was itself a place of public resort, or was a street which led to a place of public resort; it being no offence within the act for a suspected person to frequent a street, with intent to commit a felony, unless it fall within either of the above clauses. That shows the extreme strictness with which the language of this section is to be construed. [*575

COCKBURN, C. J.—I see no reason to find fault with the decision to which we are told the Court of Exchequer came in this case.

*CRESSWELL, J.—In the case of Ex parte Elizabeth Jones, the court could not take judicial notice that Regent Street was a place of the description mentioned in the act. Here, however, the commitment follows the use of the word in the statute. What it means in the one, it means in the other. [*576

The rest of the court concurring, Rule refused.

WIDDERS, App., GORTON, Resp. *Jan.* 27.

Upon a case stated by way of appeal from a county court decision, it appeared, that, the defendant being indebted to the plaintiff, the latter drew upon him two bills, which the former returned accepted, and their receipt was acknowledged by the plaintiff in a letter (to which a penny receipt-stamp was affixed) stating that they were *placed to the defendant's credit.* The plaintiff afterwards enclosed the bills in a letter addressed to the defendant, with a request that he would re-accept them, making them payable at a banker's. It was proved that this letter was duly posted; but there was no evidence to show that it had ever come to the defendant's hands. After the bills had arrived at maturity, the plaintiff sued the defendant in the county court, upon the original consideration, for goods sold and delivered. At the trial, it was contended for the defendant, that, the bills having been given *in payment* pro tanto of the plaintiff's account; and being still in existence, the plaintiff could not without producing them recover upon the original consideration. The judge decided that the plaintiff's letter did not in point of law amount to an acceptance by him of the bills *in payment,* and decided that he was entitled to recover for the original consideration:—Held, that his decision was right.

This was an appeal against a decision of the judge of the Bow county court of Middlesex. The action was for goods sold and delivered; the plaintiff by his particulars claiming 34*l.* 1*s.* 6*d.* for goods delivered between the 26th of February and the 23d of June, 1856, and giving credit for 6*l.* on account.

The facts proved at the trial were,—that, on the 25th of June, 1856, the defendant was indebted to the plaintiff in the sum of 25*l.* 9*s.* 6*d.* for goods sold and delivered; and on that day the plaintiff drew upon and sent by the general post to the defendant two bills of exchange, dated respectively the 25th of June, 1856, one bill being for 10*l.*, payable two months after date, the other being for 15*l.*, and payable three
*577] months after date. These *bills were payable to the plaintiff or his order. They were enclosed in a letter addressed and sent by the plaintiff to the defendant, as follows:—

"Birmingham, June 25th, 1856.

"Dear sir,—I sent you two dozen kitchen fenders on Monday last, and trust they are to hand ere this. I beg to enclose you two bills, one at three months, for 15*l.*, and one at two months, for 10*l.*, which please accept and return to me by first post, as I want to pay them away on Saturday morning.

"George Gorton."

The plaintiff, in previous transactions between himself and the defendant, had taken bills from the defendant, accepted by the defendant's writing across the bills "Accepted, J. D. Widders," which bills were duly paid. The defendant so accepted the said two bills so sent as aforesaid to him by the plaintiff, and he returned them by post to the plaintiff, who acknowledged their receipt in a letter sent by post, as follows:—

"Birmingham, 28th June, 1856.

"Sir,—I am in receipt of the bills, viz. one at three months, for 15*l.*, and one at two months, for 10*l.*, which are placed to your credit.

"GEORGE GORTON."

This letter was written by the plaintiff's son, by the authority of the plaintiff. To this letter was affixed a penny receipt-stamp, which was cancelled by the writer of the letter writing on such stamp the initials of his name.

The plaintiff, upon receiving these bills from the defendant, sent them to his bankers to procure them to be discounted. His bankers declined to discount them, unless they were made payable at a banker's; and the plaintiff returned the same to the defendant in a letter, to be re-accepted by him payable at a banker's, and requesting him to make them so payable. That letter was *posted by the plaintiff; but there was no evidence that it reached the defendant, beyond the fact of its having been posted. The bills not being returned accepted by the defendant payable at a banker's, the plaintiff sent a registered letter to the defendant, to return them, and, if not received, not to pay them. No answer was given to that letter; and the plaintiff, hearing that the defendant denied receiving the bills, on the 23d of July, 1856, served upon him a written notice, of which the following is a copy:— [*578

"Limehouse, July 23d, 1856.

"Mr. J. D. Widders.

"I hereby give you notice that I hold you responsible for the value of two bills of exchange, one for 10*l.*, and one for 15*l.*, sent to you through the post-office for re-acceptance: and I hereby give you further notice not to pay these bills to any person whatsoever except myself.

"GEORGE GORTON."

The plaintiff proved posting the letter enclosing the bills to be accepted payable at a banker's, and also sending the registered letter before referred to, and that neither of the letters was returned to him; and that he never accepted the bills in payment. He also proved promises of the defendant to pay the debt, these promises being made after the bills arrived at maturity, and asking further time to pay.

Upon this state of facts, it was contended by the defendant's counsel that the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not without producing them recover upon the original consideration for which they were given.

The judge, however, decided that the letters of the 25th and 28th of June hereinbefore mentioned did not in point of law amount to an acceptance by the plaintiff of the said two bills of exchange in payment

*579] pro tanto of *the debt due to him by the defendant, and gave judgment for the plaintiff for the original consideration, viz. for goods sold and delivered.

If the court should be of opinion that the judge was right, the judgment was to stand: but, if they should be of a contrary opinion, the amount of the said judgment was to be reduced to 9*s.* 6*d.*

Atherton, for the appellant.—It does not very clearly appear what it was that the judge intended to refer to the court. [Crowder, J.—He means to refer it to us to say whether or not the pieces of paper were taken in satisfaction pro tanto of the debt.] It is submitted that he could not have meant that. [Cresswell, J.—I cannot understand anything else.] It had been argued before him by the defendant's counsel, that the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not, without producing them, recover upon the original consideration. [Cresswell, J.—If the judge ruled that the plaintiff was bound to produce the bills,—there being evidence that they had been returned to the defendant,—I should say he was wrong. He, however, did no such thing: he held that the plaintiff was entitled to recover.] The bills having been given and accepted in payment, and being still in existence, the plaintiff could not recover without producing them or accounting for their absence. The judge does not decide that the posting of the letter with the bills in it, relieves the plaintiff from the necessity of producing the bills. [Williams, J.—He seems to have had in his mind those cases where it has been held that the giving a negotiable bill "for and on account of" a debt, was a quasi payment, becoming an absolute discharge by the loss of the bill.] In Hansard *v.* Robinson, 7 B. & C. 90 (E. C. L. R. vol. 14), 9 D. & R. 860 (E. C. L. R. vol. 16), R. & M. 404, n. (E. C. L. R. vol. 21), it was held that the holder of a bill cannot,

*580] by the *custom of merchants, insist upon payment by the acceptor, without producing and offering to deliver up the bill. So, in Crowe *v.* Clay, 9 Exch. 604,† it was held that the loss of a negotiable bill given on account of a debt, is an answer to an action for the debt as well as to one on the bill. [Williams, J.—There, the bill was in a complete state,—negotiable,—at the time of the loss. It is not stated here whether the bills were endorsed or not.] In Ramuz *v.* Crowe, 1 Exch. 167,† it was held to be immaterial whether the bill was negotiable or not. Besides, it is sufficiently apparent that these bills were endorsed; for, the case states that they had been sent by the plaintiff to his bankers for discount. [Crowder, J.—Do you contend, that, upon the facts which are stated to us, the decision should have been different?] The plaintiff's letter of the 28th of June, 1856, shows that the bills were then received as payment. [Williams, J.—Suppose you had to place the transaction upon the record, how would you plead it?] That the bills were given and received as payment, that they had arrived at maturity,

and that they were out of the possession and control of the plaintiff. [WILLIAMS, J.—Would it be a good replication to say that the bills were in the hands of the defendant?] Probably it would. [CROWDER, J.—The facts stated raise a presumption that the bills did get back into the hands of the defendant.] The judge has not so *found;* and the court cannot assume it. All that is stated, is, that a letter enclosing the bills, and addressed to the defendant, was posted by the plaintiff. Is the postmaster the agent of the sender of the letter, or of the person to whom the letter is addressed? A notice of dishonour of a bill or a check may be sent by post, and the posting is evidence of the sending;(*a*) but *that is an excepted case. A plea of payment of 50*l.* would not be sustained by proof of the posting of a letter containing a 50*l.* note. [WILLIAMS, J.—If this were in evidence before a jury, could you say that there was no evidence for them?] No. But, if the judge arrived at the conclusion that the letter containing the bills came to the hands of the defendant, he should have so stated on the case. [*581

Badeley, contrà, was stopped by the court.

COCKBURN, C. J.—I do not think it necessary to send this case back to the learned judge, though it might have been more accurately stated. He has, however, done substantial justice. It is obvious upon the statement he has made to us, that the conclusion he arrived at, was, that the bills had got back to the hands of the defendant: and what he means to refer to the court, is,—such being the state of things, was it incumbent on the plaintiff to sue upon the bills and to give the defendant a notice to produce? or was he at liberty to resort to the original consideration? It seems to me that the transaction as to the bills was altogether put an end to by the circumstances which took place. I think the appeal must be dismissed.

CRESSWELL, J.—I am entirely of the same opinion. Evidence is set out in the case strongly tending to show *that the bills got back to the hands of the defendant. It was contended for him at the trial, that, the bills having been given in payment pro tanto of the plaintiff's account, and still being in existence, the plaintiff could not without producing them recover in respect of the original consideration. The judge decided that the letters of the 25th and 28th of June did not in point of fact amount to an acceptance by the plaintiff of the bills in payment of the debt due to him from the defendant, so as to preclude him from suing for the original consideration. If any question of fact was necessary to be found to justify that judgment, we must assume that the judge took such a view as would make his judgment right. I [*582

(*a*) See Byles on Bills, 6th edit. p. 234, where it is said,—"Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to prove that the letter was received; and any miscarriage will not prejudice the party giving notice,"—citing Saunderson *v.* Judge, 2 H. Bla. 509; Kufh *v.* Weston, 3 Esp. N. P. C. 54; Parker *v.* Gordon, 7 East, 385, 3 J. P. Smith, 358; Langdon *v.* Hulls, 5 Esp. N. P. C. 157; Dobree *v.* Eastwood, 3 C. & P. 250 (E. C. L. R. vol. 14); Stocken *v.* Collins, 7 M. & W. 515,† 9 C. & P. 653 (E. C. L. R. vol. 38); Woodcock *v.* Houldsworth, 16 M. & W. 126.†

am clearly of opinion that there is no ground for finding fault with the decision.

WILLIAMS, J.—I am of the same opinion. Taking the narrow ground suggested, I am of opinion, upon the statement on the case, that the decision of the judge was right. It is impossible to say that the transaction detailed amounts to an acceptance of the bills by the plaintiff in satisfaction. But, in the larger view also,—and that is probably the real question intended to be presented to us,—I think there was no discharge of the debt, and that the plaintiff was entitled to judgment.

CROWDER, J.—The judge sets out the facts, and then states what the contention on the part of the defendant was, and his decision thereon, viz. that the letters of the 25th and 28th of June did not in point of law amount to an acceptance by the plaintiff of the two bills in payment pro tanto of the debt due to him by the defendant. And then the question referred to us, is, whether the decision was right. How can we help being of opinion, upon the facts stated, that the decision was right? *583] There is no ground whatever upon which we could arrive at a *different conclusion. It is contended that there is evidence that the bills were accepted as payment; and that the judge has not found as a fact that they got back to the hands of the defendant. I think, however, upon the facts stated, it is quite impossible to come to any other conclusion than that the bills did get back into the defendant's hands. The decision was right, and the appeal must be dismissed.

Appeal dismissed, with costs.

SIMMONS and Wife *v.* SIGGERS. *Jan.* 27.

The defendant's attorney having delivered all the demurrer-books, upon the plaintiff's default, the court refused to allow the plaintiff's counsel to be heard, or (his attorney not being at hand to pay for the books) to postpone the argument.

UPON this demurrer being called on, it was objected by *J. Brown*, for the defendant, that the plaintiffs were not entitled to be heard, inasmuch as the whole of the paper-books had, upon their default, been delivered by the defendant's attorney.

Gibbons, contrà,—his attorney not being present,—prayed that the case might stand over.

CRESSWELL, J.—Until the paper-books which have been delivered for you have been paid for, you are not in a condition to be heard; and it is not usual in such a case to grant time. The defendant is entitled to judgment.

The rest of the court concurring, Judgment for the defendant.

*FLORENCE *v.* DRAYSON and Others. *Jan.* 27. [*584

The defendants entered into the following agreement with the plaintiff,—"In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill and until the entire amount of same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of the said principal sum of 350*l.*"

In an action upon the above contract, for non-payment of the stipulated interest:—Held, that a plea showing that the plaintiff had endorsed over the bill to a third person, was a good answer, inasmuch as the interest could only be claimed as accessory to the bill.

THE declaration stated, that, on the 20th of February, 1856, in consideration that the plaintiff, at the request of the defendants, would discount for the defendants a certain bill of exchange, dated the day and year aforesaid, drawn by one J. H. Florence upon and accepted by the defendants, for the payment to the said J. H. Florence of the sum of 350*l.*, three months after the date thereof, the defendants undertook and agreed with the plaintiff, that, if the said bill of exchange was not wholly paid at maturity, to pay the plaintiff, as interest thereon, 17*l.* 10*s.* for each month any portion of which should have elapsed after maturity of the said bill, and that, until the entire amount of the same was wholly paid and satisfied, all payments made by the defendants should be applied first in liquidation of the interest, and afterwards in reduction of the principal sum of 350*l.*: That plaintiff did, before the said bill of exchange became due, discount the same for the defendants, and the said bill of exchange became due according to its tenor and effect before the commencement of the suit, and that no part of the said bill of exchange was paid at the maturity of the same bill, and the same remained and was wholly unpaid for a long time afterwards; and that, although the defendants did make certain payments to the plaintiff, and, after applying (and the plaintiff did so apply) all such payments so made by the defendants to the plaintiff first in liquidation of the said interest and afterwards in reduction of the said *principal sum of 350*l.* according to the said contract, there was at the time when this action [*585 was commenced, and still remained, a large sum of money, to wit, 17*l.* 10*s.*, left due and unpaid to the plaintiff under the said contract of the said principal sum of 350*l.* in the said bill specified: And that divers months and portions of months had elapsed since the maturity of the said bill before this action was commenced, and that all things and events had happened, to entitle the plaintiff to be paid the said sum of 17*l.* 10*s.* of the said principal money, and also as interest the sum of 17*l.* 10*s.* for each of the said months and portions of months which had so elapsed as aforesaid since the maturity of the said bill; yet the defendants did not nor would pay the plaintiff the said sum of 17*l.* 10*s.* of the said principal money as aforesaid, or the sum of 17*l.* 10*s.* for each of the said months and portions of months which had so elapsed since the maturity of the said bill as aforesaid, and the same respectively

were still wholly due and unpaid to the plaintiff: And the plaintiff claimed 17*l.* 10*s.* for principal, and as interest the sum of 17*l.* 10*s.* for each of the said months and portions of months which had elapsed before, and which might elapse since, the commencement of the suit, until payment, or judgment.

Pleas,—first, that the defendants did not agree with the plaintiff as in the declaration alleged.

Secondly, that the said agreement was and is an agreement in writing, in the words following, that is to say,—

"London, 20th February, 1856.

"To Mr. J. H. Florence.

"Sir,—In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill, and *586] *until the entire amount of same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of said principal sum of 350*l.*

"Drayson, Harvey & Co.

"350*l.* drawn by J. H. Florence on Drayson, Harvey & Co., at three months."

Averment, that the said J. H. Florence who drew the said bill, and the plaintiff, were and are one and the same person, and that the said bill was according to its tenor and effect payable to the plaintiff's order: That, upon the day on which the said bill became due, the plaintiff endorsed and delivered the said bill to one William Tabor; by virtue of which said endorsement the said William Tabor became and was, and from thence until and at the payment and satisfaction of the said bill as thereinafter mentioned, continued to be, the holder and owner of the said bill, and entitled to receive payment and satisfaction of and for the same: And that afterwards, and after the defendants had accepted the said bill, and after the day on which the said bill became due, and before the suit, they the defendants satisfied the said bill by paying to the said William Tabor the sum of 350*l.* 11*s.* 8*d.*, which sum he the said William Tabor, then being such holder, owner, and endorsee as aforesaid, received of and from the defendants in full payment and satisfaction and discharge of the said bill, and thereupon, and before this suit, delivered up and returned to the defendants the said bill as then being a paid and satisfied bill.

The plaintiff took and joined issue upon the above pleas; and also demurred to the second plea, the ground stated in the margin being as follows:—"One of the objections to the second plea, is, that it admits that the bill of exchange was not paid at maturity, and not until some-*587] time afterwards; and it also *admits that the 17*l.* 10*s.* interest was not paid in respect of the portion of the month during which

the bill remained unpaid. The plea, therefore, admits the averments and breach in the declaration, and shows no answer thereto or to the plaintiff's cause of action in respect thereof,—the payment to the holder of the bill (Tabor) of 350*l.* 11*s.* 8*d.*, being no answer to the defendant's breach of contract."

Manisty, in support of the demurrer,(*a*)—The *contract declared upon is a separate and distinct contract from that contained [*588 in the bill, and one upon which an action is maintainable quite irrespective of the bill. [CROWDER, J.—Would interest be payable on the bill besides, or was the 17*l.* 10*s.* per month a substitution for the interest?] As between the parties to the contract, it would no doubt be a substitution for interest on the bill; but not as between the defendants and a third party, the holder of the bill. [CRESSWELL, J.—The contract is a very peculiar one. Suppose 200*l.* of the 350*l.* was paid on the bill becoming due, how would that sum be applied?] In satisfaction pro tanto of the principal. [CRESSWELL, J.—The contract evidently contemplates the plaintiff remaining the holder of the bill. How can one who is not the holder be entitled to interest upon it?] The simple question is, whether this is a binding contract, and between whom. [COCKBURN, C. J.—May it not mean this,—"If the bill is unpaid, and you (the plaintiff) are entitled to interest upon it, that interest shall be at the rate of 17*l.* 10*s.* per month?"] If this is a contract with the plaintiff, and no one else could sue upon it, is it not an independent contract for the payment of 17*l.* 10*s.* per month so long as any part of the bill, in whose hands soever it may be, remains unpaid? Two actions might very well lie,—one upon the bill, at the suit of the holder,—the other, upon the contract, for payment of the stipulated interest.

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the declaration does contain an agreement by the defendants to pay the principal money of the bill of exchange, and therefore that the declaration is sufficient as to the claim for the part of principal admitted not to have been paid to the plaintiff:

"2. That, the defendants having contracted with the plaintiff, by an independent contract, to pay interest at the rate specified, if the bill was not wholly paid at maturity, the rule that interest is accessory to and follows the right to the principal, does not apply to this case; and therefore that the fact that the plaintiff endorsed away the bill of exchange will not bar the plaintiff's right of action founded on such independent contract, for its breach (which is admitted on the record) in not paying the interest as there agreed:

"3. That the plaintiff has a good cause of action in respect of the breach (admitted on the record) of the independent contract, in not paying the interest as agreed; and that such cause of action exists, although the plaintiff, by endorsing over the bill, may not have been entitled to the principal of the bill of exchange; and that, notwithstanding the endorsement over of the bill, and payment to the endorsee, yet, as such payment was after the bill became due, the defendant still broke his contract with the plaintiff, and, by the non-payment of the bill when it became due, the plaintiff was subjected to an action on the bill at the suit of the endorsee:

"4. That the agreement set out in the second plea, coupled with the averments therein, agrees with and does not negative the agreement as stated in the declaration:

"5. That the agreement as set out in the second plea must be taken as part of the declaration and the agreement declared on; and, whether that agreement does or does not agree with the agreement stated in the declaration is immaterial, it being still apparent on the record that the defendant has committed a breach of the agreement set out and on which the action is brought, and the plaintiff is entitled to recover on the grounds stated in the second and third points."

*589] *Lush*, contrà.(*a*)—The contract assumes that the *plaintiff shall be in a condition to demand interest on the bill.

COCKBURN, C. J., (stopping *Lush*).—It appears to me that there is no difficulty whatever in this case. The contract declared upon is certainly a very peculiar one. The defendants, addressing the plaintiff, say,—"In consideration of your discounting for us the undermentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay,"—not saying to whom,—"*as interest thereon*, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill, and until the entire amount of same is wholly paid and satisfied; all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of said principal sum of 350*l.*" The stipulation is for payment of the 17*l.* 10*s.* per month *as interest on the bill.* Interest could only be payable on the bill to the holder of it, as accessory to the principal. When the plaintiff passed away the bill to a third person, he was no longer in a condition to demand interest. I think the defendants are entitled to judgment.

*590] CRESSWELL, J.—I am of the same opinion. It is *impossible to separate the right to the interest from the bill, to which the interest was accessory.

The rest of the court concurring,

Judgment for the defendants.

(*a*) The points marked for argument on the part of the defendants, were,—

"That the declaration is bad as to the claim for part of the principal, because it contains no promise to pay the principal; and that, as the 17*l.* 10*s.* per month was to be paid as interest, it clearly means that, unless the plaintiff continued entitled to the principal, he was not to have it, interest being accessory to and following the principal; and, consequently, that he disentitled himself to the interest, by endorsing away the bill, and never could become entitled to interest afterward, as the satisfaction of the bill while outstanding, and when it was overdue, prevented him from ever again becoming entitled to the principal: and that the written agreement as set out does not agree with and negatives the agreement as stated in the declaration."

SAMPSON *v.* HODDINOTT. *Jan.* 20.

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. By usage, he may acquire a right to use the water in a manner not justified by his natural right: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement.

The plaintiff had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows: and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully:—

Held, that this detention of the water by the defendant was a use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action.

In such a case, it is not necessary to show *actual* damage to the plaintiff's reversionary interest: it is enough to show an obstruction of his right, and, such obstruction of his right being shown, the law will infer damage.

The right of the riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains.

THIS was an action for an injury to the plaintiff's reversion, by diverting a stream of water.

The declaration stated that certain tenants of the plaintiff were possessed of certain water meadows, the reversion thereof being in the plaintiff, into which meadows a portion of the water of certain streams of right ought to have run, for watering the same; and the defendant, by obstructing and diverting the said streams, deprived the said meadows of the use of the said *portion, and injured the plaintiff's [*591
reversionary interest: and the plaintiff claimed 200*l.*

Pleas,—first, except as to part of the grievances in the declaration mentioned, not guilty,—secondly, except as above in the first plea was excepted, that he did what was complained of, so far as related to the causes of action to which that plea was pleaded, by the plaintiff's leave,—thirdly, as to certain alleged grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that the defendant, before and at the said times when, &c., was possessed of land the occupiers whereof for twenty years before the suit enjoyed, as of right, and without interruption, the privilege of using one of the streams in the declaration mentioned for agricultural purposes, and of obstructing and diverting the said stream for those purposes, for the better use and enjoyment of the said land; and that the alleged grievances to which that plea was pleaded, were uses by the defendant of the said privilege or easement,—fourthly,

as to certain grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that the defendant, before and at the said times when, &c., was possessed of land the occupiers whereof for forty years before the suit enjoyed, as of right and without interruption, the privilege of using one of the streams in the declaration mentioned, for agricultural purposes, and of obstructing and diverting the said stream for those purposes, for the better use and enjoyment of the said land; and that the alleged grievances to which that plea was pleaded, were uses by the defendant of the said privilege or easement,—fifthly, as to certain alleged grievances in respect of one of the said streams, being part of the alleged grievances to which the first plea was pleaded, that, long before the said time *592] when, &c., the plaintiff, or a person by, from, or under *whom the plaintiff and his said tenants, subsequently to the grant hereinafter mentioned, derived all his and their estate, right, and title to the said water-meadows, and the said right of irrigating the same in the declaration mentioned, then being seised or possessed of the said water-meadows for an estate not yet determined, but still in full force and existence, by deed granted to a person then seised in his demesne as of fee of and in certain land near the said stream, the privilege of using the waters of the said stream for agricultural purposes, and of diverting and obstructing the said stream for those purposes, for the better use and enjoyment of the said land for and during the whole of the said estate of the said grantor, which said land, with the said privilege so granted as aforesaid, before the said times when, &c., became legally vested in the defendant for and during a term of years not yet expired; and the defendant before and at the said times when, &c., was and still is lawfully possessed of the said land, together with the said privilege, for the said term of years not yet expired; and that the grievances to which that plea was pleaded were uses by the defendant of the said privilege,—sixthly, except as above in the first plea was excepted, that the streams in the declaration mentioned, except as above was excepted, ought not to have run into the meadows in the declaration mentioned, for watering the same, as in the declaration alleged,—seventhly, as to the grievances above in the first plea excepted, payment into court of one shilling.

The plaintiff joined and took issue on all the pleas except the last; and, as to that, traversed the sufficiency of the money paid into court. Joinder.

The following particulars of claim and defence respectively were delivered pursuant to judge's order:—

"This action is brought to recover damages for infringing the plain-*593] tiff's reversionary interest in certain *water-meadows belonging to Sherborne Wyke Farm, in the parish of Sherborne, in the county of Dorset, and now in the possession of his tenants, William

Sampson, Walter Sampson, and Thomas Sampson, by obstructing and diverting the water of a certain river or stream running from and beyond a mill called Edmund's Mill, or West Mill, in the said parish of Sherborne, to and adjoining certain lands in the possession of the defendant, also situate in the said parish of Sherborne, and also to and adjoining the plaintiff's said water-meadows, by cutting certain channels from the said river or stream to the defendant's said lands adjoining, and placing certain hatches in such channels, and occasionally placing a temporary bay across such river or stream, and also by obstructing and diverting water of another stream called the back-water cut running through the defendant's said lands, by placing a hatch in such stream, and also by obstructing and diverting water of another stream called Silver Lake Spring, which rises on certain land in the defendant's occupation, also situate in the said parish of Sherborne, by penning back the same water, and forming it into a large pond, and using such water for the purpose of driving a water-wheel attached to a grist-mill and a threshing-machine, thereby impeding the proper and usual flow of the water of the said streams to the plaintiff's said water-meadows, and permanently detaining and depriving the plaintiff's said water-meadows of a great portion of such water."

"The third, fourth, and fifth pleas relate to a branch of the river Yeo, and to a stream running into it called Silver Lake, respectively, and to land in the occupation of the defendant near the said river and stream respectively. The defendant claims not only the rights stated in those special pleas, but also a common law right to use the above-mentioned streams reasonably for irrigating land in his occupation near them respectively, and *for other purposes connected with the occupation of the said land. The defendant also relies upon the traverses as enabling him to contest the plaintiff's case. The defendant also relies upon the second plea, as enabling him to prove a license for all or some of the matters complained of. The plea of payment into court is intended to cover any use of the said river and stream not met by the other pleas." [*594

The following are particulars of the grounds of defence as to the back-water cut mentioned in the particulars of claim:—

"The defendant claims a common law right to use this stream reasonably for irrigating land in his occupation near it. The defendant also relies upon the traverses herein as enabling him to contest the plaintiff's case. The defendant also relies upon the second plea as enabling him to prove a license for all or some of the matters complained of. The plea of payment into court is intended to cover any use of the said stream not met by the other pleas."

The cause came on for trial before Crompton, J., at the last Summer Assizes for Somersetshire, when a verdict was taken for the plaintiff, for the damages in the declaration, subject to a special case.

The last plea was struck out by consent, at the trial, with power to the court to restore it if desirable for the purposes of justice.

The court, it was agreed, was to be at liberty to draw any inferences of fact which a jury ought to draw: and if, in settling the case, it should be necessary, in the opinion of the judge, that any fact should be ascertained, he should have power to ascertain the same, and the court should have the same power.

The premises were described in the annexed map or plan, which accompanied and was to be taken as a part of the case.

*595] *The plaintiff's ancient water-meads, called Dairyman's Mead (or Twenty Acre Mead), Mill Moore, Twelve Acre Mead, and Water Sams, containing together about forty-one acres (part of Wyke Farm), and marked C. on the map, had without interruption been immemorially irrigated and watered, up to the commencement of this action, from the water in the adjoining river called "The Yeo" (and which river is shown on the said map, and runs from and above a mill called West Mill, situate in Sherborne, marked on the map with the letter B., to and beyond Wyke Farm), by means of channels cut adjoining such river, with hatches, near the site of an ancient mill situate in Thornford, and the old Mill Pond which are marked on the map with the letter A.: but the plaintiff's water-mead called Swain's Moor, which was merely a catch-meadow, was watered at times of flood (by means of the hatches marked on the map with the letter E.) from the old drain or ditch or back-water cut marked on the map with the letter D., which ran through a large common called Sherborne Moor, situate on the eastern side of and adjoining Wyke Farm, and partly from other sources.

Since the irrigation by the defendant hereinafter mentioned, the water from the river Yeo used by him for such purpose could never be made available for the watering of Swain's Moor.

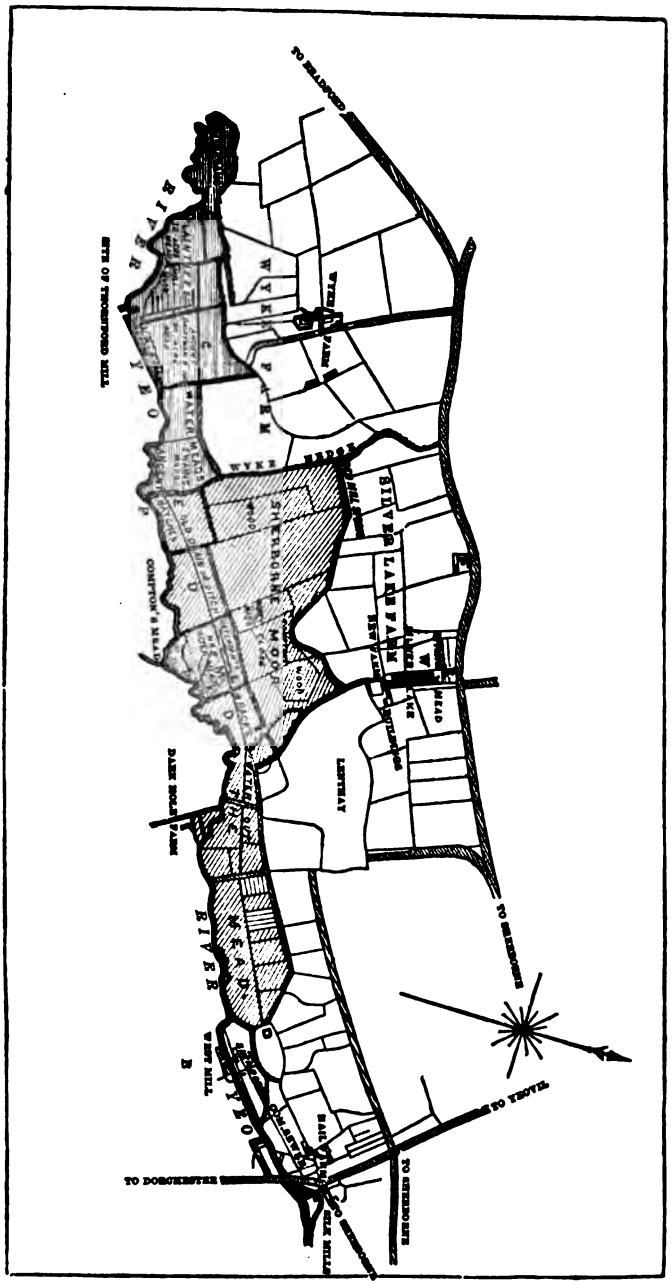
The defendant, before and at the time of the acts complained of, was the occupier of a farm called Silver Lake Farm, under Earl Digby, of which said farm a certain meadow hereinafter mentioned adjoined the river Yeo higher up the stream than the said meadows of the plaintiff.

In 1832, the old drain or ditch or back-water cut was widened and deepened for the more quickly taking off the surface water on Sherborne

*596] Moor, and carrying it *into the river: but no artificial means were employed for irrigating any portion thereof, until the making of the defendant's water-mead hereinafter referred to.

In 1845, under the authority of an act of parliament for that purpose, Sherborne Moor was enclosed and allotted to Earl Digby; and a portion thereof was added to a farm called Silver Lake Farm, then and still occupied by the defendant as yearly tenant to Earl Digby, which adjoins the Wyke Farm on the eastern side thereof.

This portion,—the meadow hereinbefore referred to,—being liable to


RIVER
PARK
SHERBORNE MOOR
SILVER LARK FARM
LETTRAY
RIVER
TO DORCHESTER
TO YEOVIL
TO SHERBORNE

be periodically flooded from the said river, and the flood-water remaining a long time on the land, in 1848 the defendant made a channel or cut to take the water from the river to the old drain or ditch or back-water cut, as shown on the map, from K. to L., which was 4 feet 4 inches wide, and 3 feet 10 inches deep, and 104 yards long; and, in 1849, the defendant drained with tiles that part of the defendant's water-mead shown on the said map, and containing about 7 acres, which is situate on the north side of the old drain or ditch or back-water cut.

The said channel or trench was then carried over the cut so as to convey the river water across it when required for irrigation; and since then it has been regularly irrigated.

In 1850 and 1851, the defendant also drained with tiles the south side of the water-mead, containing 13 acres; and, in the summer of 1854, the defendant built a weir across the old drain or ditch, at a point marked with the letter M. on the map, and put a hatch into such weir; and, in the autumn of 1854, by means of such hatch, watered the north side of the defendant's new water-mead; and, by means of three channels cut adjoining and nearly as deep as the river at points marked *597] *with the letters N., O., and P., on the map, also watered the south side of the defendant's new water-mead.

After passing over the defendant's meadow, the water was not detained in the trenches or upon the land; but it was kept flowing over and from the land, without any penning back whatever.

The bed of the said river was nine inches below the bottom of the said hatches. The water of the said river is penned every night at West Mill, which is higher up the stream than the said meadow of the defendant, and was generally let down between 5 and 6 o'clock in the morning. The river was more or less always flowing. The said morning supply did not reach the plaintiff's meadows at any fixed time, but varied. In the winter months, when it is most employed for irrigation, the supply of water is always the greatest: but in consequence of the unusually tortuous character of the river's course, the water, by being carried over the defendant's meadow directly into the said old drain or ditch or back-water cut, flows again into the said river higher up the stream than the plaintiff's meadows, at a point marked F. on the map. All the water passing the defendant's hatches, *except so much as is necessarily absorbed in the course of irrigation*, thus gets again into the river before the river reaches the plaintiff's meadows.

The water of the river Yeo has been materially improved for irrigation, in consequence of a board of health having been established at Sherborne about the year 1851; and the sewage of that town ran into the river near West Mill, at a point higher up the river than the defendant's new water-mead; and the defendant's new water-mead was benefited by the water of such river first flowing over and depositing upon the defendant's new water-mead the fertilizing properties of such water;

and the plaintiff's ancient water-meads were injured by being deprived thereof.

*There is a spring of water which rises on the defendant's farm, called Silver Lake Farm, marked on the map with the letter R., which formerly used to run into the river. This spring rises in a willow-bed on the defendant's farm, marked W. on the map. Prior to the year 1831, the water from this spring, not absorbed in its passage, found its way through several muddy ditches to the Sherborne Moor; but, in that year, the course was changed, and the water was used by the defendant for the irrigation of two of his fields, called respectively Compton's Close and Honey Naps. [*598

This state of things continued till 1842, when the defendant erected a water-wheel and a threshing-mill, intended and used for agricultural purposes, for threshing, and for grinding barley for the purpose of his farm only. At this time also, a great part of the willow-bed in which the spring rose, which adjoins the said erections, and which was extremely swampy, was dug out by the defendant, and made into a pond, the bottom and sides of which were puddled with clay. The ditch into which the said spring water used to percolate from the said willow-bed, was then also cleansed out, and a thoroughly good channel for the water made for some distance by a culvert, and thence conducted as formerly, but in an improved channel, to the said moor. In making the culvert in 1842, the defendant struck upon some new springs, which afterwards flowed into the said moor by the same course as the said old spring. The defendant also about the same time drained some fields into the said road; and from that source and the new springs together there was an additional supply of water equal in amount to the old one.

In 1842, the defendant ceased to irrigate Compton's Close and Honey Naps; and since then all the water from all the said sources went to the said moor, and subsequently into the said river.

*When the water-wheel is not in use, the water from the pond is carried off by a mask-hatch into the said culvert. [*599

In 1846, a new barn and other farm buildings were erected by Earl Digby near Silver Lake Spring; and the defendant built a dam or pond-head across the line of Silver Lake Spring, to pen back the water, and dug a pond which from time to time has been increased to upwards of three-quarters of an acre in extent; and the water from this pond is used by the defendant for driving a water-wheel attached to a threshing-machine and a mill for grinding corn, and other farm purposes; and, when the defendant intends to use his water-wheel, he pens back the water until the pond is full, and then lets it off, either in large or small quantities, at his own pleasure, for driving the water-wheel; the water (as well when the water-wheel is at work, as when the pond is full) runing off to the river.

The water from the river Yeo and Silver Lake Spring together, was

never, except in case of a flood, sufficient for watering the plaintiff's ancient water-meadows and the defendant's new water-mead at the same time.

The water is penned every night at West Mill; and, when the defendant was not watering his new water-mead, the water generally came down to the plaintiff's (Wyke) farm about 12 at noon, and six or seven acres of the plaintiff's water-meads could be watered at a time: but, when the defendant was watering his new water-mead, the water did not come to the plaintiff's farm until about 3 o'clock in the afternoon; and then only three or four acres of the plaintiff's water-meads could be watered at a time: and, in winter time, it was after dark, and therefore too late to put the water over the plaintiff's meads at all.

There was evidence, that, in consequence of the defendant's watering his new water-mead in the autumn *and winter of 1854, the plaintiff's tenants could only water some of their meads, and lost some spring feed of the meads. *600]

There was evidence on the part of the defendant, that the hay crop in the Dairyman's Mead was as good as ever.

It was an admitted and agreed fact in the case, that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste; and that the wheel and mill were used for agricultural purposes, for threshing and grinding barley for the purposes of the defendant's farm only, and, if right existed, there was no abuse or excess.

The plaintiff contends that he is entitled to a verdict on each of his three claims mentioned in his particulars,—

On the first, because the defendant not only diverts the water from the river for watering his water-mead adjacent to the river, by three channels marked with the letters N. O. and P. on the map or plan, but, by means of the channel marked K. on the said map or plan, gives another direction to the water so diverted from the river across his new water-mead into the old drain or ditch at L., a distance of 104 yards, not for the purpose of watering his new water-mead adjacent to the river, but his new water-mead on the opposite side of the old drain or ditch, and therefore unreasonably detains the water.

On the second, because the defendant has obstructed and diverted the water of the old drain or ditch, by placing a hatch therein so late as the summer of 1854, for watering his new water-mead on the northern side thereof, and thereby preventing the water from flowing down the old drain or ditch and watering the plaintiff's mead called Swain's Moor, or running into the river as theretofore.

On the third, because the defendant pens back the *water of Silver Lake Spring in his pond, until at his own pleasure he allows it to run, either in large or small quantities, when he is using his water-wheel, or the pond is running over, in its natural course into the *601]

river, which natural course would at all times have increased the water flowing through the same to the plaintiff's ancient water-meads, as the water from Silver Lake Spring could not, like the river above, be legally penned or interfered with, by West Mill or otherwise.

And the plaintiff contends that this reversionary interest in his ancient water-meadows, is injured,—

First, by his ancient water-meadows being deprived of the first catch or use of the water, the fertiliizng sediments or properties of which are deposited on the defendant's new water-mead, instead of the plaintiff's ancient water-meadows:

Secondly, by the plaintiff's ancient water-meadows being deprived of those parts of the water which are lost by absorption and evaporation in the defendant's new water-mead, which is very porous (the upper soil thereof being peaty, with a layer of gravel, and a subsoil of clay), the whole of the water in the river being insufficient (except during floods) to water even the plaintiff's ancient water-meadows:

Thirdly, by the water which flows over the defendant's new water-mead being detained there until it is too late for the plaintiff's tenants to watch and attend to the watering of the plaintiff's ancient water-meadows; they being prevented using the water at night, by its being penned first at the Silk Mills, and secondly at West Mill, as soon as the workmen leave off work.

The defendant asserts,—First, that he had a right to the reasonable use of the water of the river for the irrigation of his land higher up than the lands of the plaintiff; that the use so made was reasonable; and that he returned the water so taken for irrigation into the river *again at the point above the plaintiff's land, with no other diminution than that caused by the absorption and evaporation occasioned by such irrigation: [*602

Secondly, that, having the right to such reasonable use of the water, it is an admitted fact that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste:

Thirdly, that, with respect to the Silver Lake Spring, such spring rises out of the land of the defendant; that he and the previous occupiers of his farm have used the water from time to time in different ways for the purposes of the farm; that the defendant had the right to do the acts complained of on his own land; and that his so doing was not injurious to or an infringement of any right of the plaintiff:

Fourthly, that, the defendant having such right, it is an admitted fact that the said mill and wheel was used for agricultural purposes, for threshing and grinding barley for the purposes of the defendant's farm only, and that there was no abuse or excess in the use so made thereof:

Fifthly, that there was no damage or injury to the plaintiff's reversionary interest in his lands:

Sixthly, that the plaintiff was not entitled to the absolute and exclu-

sive right to the flow of all the water of the river to his land below that of the defendant; but only a right to irrigate, subject to the right of riparian proprietors above to a similar enjoyment of the stream.

The question for the opinion of the court, was, whether the plaintiff was entitled to recover.

If the court were of opinion in the affirmative, the verdict was to stand for 40*s.*,—with a certificate that the cause was fit to be tried in this court, and was brought to try a right.

*603] *M. Smith*, Q. C. (with whom were *Kinglake*, Serjt., *and *Barstow*), for the plaintiff.—It appears from the case that the plaintiff's meadows are ancient water-meadows. [CRESSWELL, J.—You cannot found any claim upon that. Irrigation is a riparian right, to be exercised subject to the rights of other riparian proprietors.] No doubt: but, even in the American law (which is most liberal on the subject of water privileges), it has never been supposed that there could be a right in a proprietor higher up the stream so to use the water as to deprive the one below him of all enjoyment of it. [CRESSWELL, J.—The complaint here is, rather of the inconvenient times of the water coming down to the plaintiff's meadows than of the insufficient quantity.] The case of Embrey *v.* Owen, 6 Exch. 353,† when closely looked at, will be found to be an authority in the plaintiff's favour. It was an action by the occupiers of a water grist-mill, against a riparian proprietor, for diverting the stream. The defendant pleaded,—first, not guilty,—fourthly, that, at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small and reasonable quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; and that the diversion caused no damage to the plaintiff's mill. To this the plaintiff replied de injuriâ, whereupon issue was joined. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognisable by the senses. In directing the jury, the judge left it to them, with respect to the issue on not guilty, to say whether there was any *sensible diminution* of the water by reason of the diversion; and with respect to the other issue, he told them that he had a

*604] difficulty in affixing a legal meaning to the term *"inappreciable," but suggested that it might mean a quantity so inconsiderable as to be *incapable of value or price.*" The jury found in favour of the defendant upon both issues; and, upon a motion to enter a verdict for the plaintiff on the first issue, and to enter judgment non obstante veredicto on the fourth, it was held that there had not been such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was properly found for the defendant; and

the court inclined to think that the word "inappreciable" meant "incapable of being estimated or valued," and that in that sense the fourth plea was not proved. An American case,—Blanchard *v.* Baker, 8 Greenl. Rep. 253,—was cited on the argument, wherein the law is thus stated: "The proprietor of a watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes. And he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished." In delivering judgment in Embrey *v.* Owen, Parke, B., says: "The law as to flowing water is now put on its right footing by a series of cases beginning with that of Wright *v.* Howard, 1 Sim. & S. 190, followed by Mason *v.* Hill, 3 B. & Ad. 304 (E. C. L. R. vol. 23), 5 B. & Ad. 1, and ending with that of Wood *v.* Waud, 3 Exch. 748,† and is fully settled in the American courts: see 3 Kent's Comm., Lect. 52, pp. 439—445. The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right in each proprietor of the adjacent land to the flow of *all* the water in its natural state; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common *benefit that an action will lie." And his lordship cites a passage from Kent's Commentaries, where it is said: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title for some exclusive enjoyment. He has no property in the water itself, but a simple usufruct as it passes along. 'Aqua currit et debet currere,' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application of it. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him." Each case [*605

must depend upon its own circumstances,—the capacity of the stream, and the extent of the user. [CRESSWELL, J.—I do not find that the case states the size of the river Yeo.] It does not in terms: but it states that "the water from the river Yeo and Silver Lake Spring together was never, except in case of a flood, sufficient for watering the plaintiff's ancient water-meadows and the defendant's new water-mead *606] at the *same time." The facts clearly show that the defendant cannot be entitled to make this large diversion of the water. [CRESSWELL, J.—I infer from the statements in the case that the diminished quantity arises merely from the lateness of its arrival on the plaintiff's land. The case does not find, that, if the water came down earlier, the plaintiff could not irrigate as large a number of acres as he did before.] It does show that the quantity is diminished for the purpose of the plaintiff's irrigation. [CRESSWELL, J.—It is not stated that the plaintiff is entitled to have the water sent down by the miller at any particular time. It seems to be left entirely to his discretion.] It is manifest, that, but for the diversion and obstruction of the defendant, the plaintiff would have had a much larger benefit from the water than he has; and Mason v. Hill, 3 B. & Ad. 304 (E. C. L. R. vol. 23), shows that the diversion gives the plaintiff a right of action. And in Dickinson v. The Grand Junction Canal Company, 7 Exch. 299,† Pollock, B., says: "We consider it as settled law, that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above or below it, but is ex jure naturæ,"—citing Shury v. Piggot, 3 Bulstr. 339, Tyler v. Wilkinson, 4 Mason's (American) Rep. 397. With regard to the back-water cut, its origin does not appear. [CRESSWELL, J.—It would seem to have been for the purpose of drainage.] Is there any difference in point of law between a drain and any other water-course? [CRESSWELL, J.—All the authorities, from the Digest downwards, show that there is.] Magor v. Chadwick, 11 Ad. & E. 571 (E. C. L. R. vol. 39), 3 P. & D. 367, shows that the law of easements in respect of watercourses is generally the same, whether they are natural or artificial. [CROWDER, J.—That case has been considered not altogether satisfactory; and it is inconsistent with Arkwright v. Gell, 5 M. & W. 203.†] *607] That is explained by the *observation of Erle, J., and the judgment of Lord Campbell, in Beeston v. Weate, 5 Ellis & B. 986 (E. C. L. R. vol. 85). As to the Silver Lake Spring, the question is whether the erection of the dam by the defendant was not an obstruction of the plaintiff's rights,—Broadbent v. Ramsbotham, 11 Exch. 602.† [CRESSWELL, J.—An obstruction of what right? Does the plaintiff claim it because the water is his before it becomes part of the flowing stream? or does he claim it as coming from a servient tenement?] His claim is, that this is water which of right ought to run into the river. [CRESSWELL, J.—Not a drop of it.] The real question arises on the river Yeo. Then,

as to damages,—it will be said that no damage to the reversionary interest is shown. It is enough, however, to show an obstruction of a right: the law will infer damage: Kidgill *v.* Moor, 9 C. B. 364 (E. C. L. R. vol. 67), Embrey *v.* Owen, 6 Exch. 353.† [CRESSWELL, J.—You need not trouble yourself on that point.]

Butt, Q. C. (with whom were *Slade*, Q. C., and *Efooks*), contrà.—This being the case of one riparian proprietor against another, the exercise of the right for any length of time makes no difference: per Pollock, C. B., in Dickinson *v.* The Grand Junction Canal Company, 7 Exch. 282, 291.† Each has the common right to the reasonable use of the water of a flowing stream, for the purpose of irrigating his own land. If, in the exercise of that right, the riparian proprietor above uses an undue quantity of the water, or detains it an unreasonable time, then, as is put in Embrey *v.* Owen and Blanchard *v.* Baker, in respect of that excess the riparian proprietor below him might have a right of action. If the plaintiff has by user acquired any right beyond wnsho that the use he made of the water was not referable to his riparian that of a riparian proprietor, the defendant might be liable if it could be right. The only question, therefore, upon the first point, is, whether *the facts stated in the special case are such as to show that the defendant has exercised his natural right of irrigation in an unreasonable manner. [CROWDER, J.—Suppose the plaintiff had exercised rights beyond what was reasonable, and so had acquired a new right as against riparian proprietors below him on the stream, would that affect the defendant's right?] Clearly not. Whatever use the proprietor *below* may make of the water, the proprietor *above* still retains his natural rights. [WILLIAMS, J.—The riparian proprietor above might, no doubt, by grant, divest himself of his right to use the stream for the purpose of irrigation: but the mere non-user of the right would not raise a presumption of a grant.] In Northam *v.* Hurley, 1 Ellis & B. 665, where A., being owner of land through which a stream ran down to the land of B., granted by deed to B. that the stream should be in the control of B. and his assigns, and should flow in a free and uninterrupted course through a channel described in the deed, and afterwards A. and B. respectively assigned their lands to Y. and Z.,—it was held, that Y. was liable to an action at the suit of Z. for diverting the water from such channel, though he did not thereby deprive Z. of the use of any water. But, in giving judgment, Coleridge, J., says: "Our judgment is founded on the effect of the deed which governs the rights of the present parties; and, in so deciding, we do not intend at all to limit the salutary principle laid down in Embrey *v.* Owen, to the effect that the superior riparian proprietors may use the stream for all reasonable purposes while in their land, provided they send it on without material diminution to inferior proprietors." The facts stated in this special case show that what was done by the defendant here was [*608

done in the proper course of irrigation, and that the water, after its user by the defendant, got back again into the stream without undue waste before it reached *the plaintiff's meadows. Nor is it found *509] by the case that an unreasonable quantity of the defendant's land was irrigated. On the contrary, there is an express admission "that the defendant irrigated his land in a proper course of irrigation, without excess or unnecessary waste." [CRESSWELL, J.—We are all agreed that you need not trouble yourself as to the back-water cut, and the Silver Lake Spring.]

Smith, in reply.—The true principle is that which is laid down in Mason v. Hill, 3 B. & Ad. 304 (E. C. L. R. vol. 23). Every riparian proprietor has a right to the natural use of flowing water, subject to its reasonable use by the riparian proprietors above him, but not subject to a right to divert the water by means of cuts or channels for the purpose of irrigation. It is found that the plaintiff's meadows have been immemorially irrigated: he has, therefore gained a title to the uninterrupted flow of the water for that purpose. The case shows an absence of that limit to the defendant's exercise of his right which alone could make it lawful. There has been a sensible diminution and detention of the water, and a consequent damage to the plaintiff. The facts clearly do not bring the case within the principle of Embrey v. Owen.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

In this case, several causes of complaint were brought forward on behalf of the plaintiff,—first, in respect of the diversion of the river Yeo,— secondly, in respect of the diversion of a stream called the Back Water,—thirdly, in respect of the obstruction and diversion of a stream called the Silver Lake Spring.

In the course of the argument, the court decided all the points that *510] were raised in respect of the two latter *causes of complaint, in favour of the defendant; but they took time to consider the question arising on the first.

The result of the facts as to this part of the case appears to us to be as follows, viz. that the plaintiff had immemorially enjoyed the benefit of irrigating certain of his meadows with the water of the river Yeo, subject, however, to the right of the miller at West Mill to detain the water for the use of his mill. Although the natural flow of the river was prevented by the exercise of this right, yet the water was allowed to come down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant, for the purpose of irrigating his own adjacent land, had from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows: and, although the facts stated in the special case do not, in our opinion, lead to any certain conclusion, that, by the mere irrigation on the part of the defendant, the quantity of water which ulti-

mately reached the plaintiff's meadows was sensibly diminished, yet the effect was, that the water was detained, by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully.

The question is, whether such a diversion and detaining of the water by the defendant is actionable.

It was contended, on his part, that it was not, because he had a right by law, as a riparian proprietor, to apply the water of the stream to irrigate his adjacent land, provided he did so (as it was admitted he did) in a careful and proper manner.

On the part of the plaintiff, it was denied, generally, that a riparian proprietor has any such right: and it was also contended, that, at all events, in this case the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment.

*As to the latter proposition, it appears to us that all persons having lands on the margin of a flowing stream have, by nature, [*611 certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement.

But, if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case, his right has been equally invaded, and the action is maintainable.

The question between the parties is thus reduced to this single point, —has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that?

The general principle of law which, in our opinion, may be deduced from the decision of Embrey v. Owen, 6 Exch. 353,† and the authorities cited by Parke, B., in delivering judgment in that case, is, that every *proprietor of lands on the banks of a natural stream has a right [*612 to use the water, provided he so uses it as not to work any mate-

rial injury to the rights of other proprietors above or below on the stream.

In the present case, it appears to us, on the evidence, that the detention by the defendant, under the circumstances, of the water of the river Yeo for the purposes of irrigation, was a use of it which, in its character, was necessarily injurious to the natural rights of the plaintiff as the proprietor of land lower down the stream. The effect was obviously the same as if the defendant had placed a bar or weir across the river, and by that means had wholly prevented its natural course for a certain number of hours. And it appears to us that there is neither authority nor principle for contending that such an act can be justified on the ground that it was done for the purpose of improving the adjacent land of the defendant, whether by irrigation or otherwise.

For these reasons, we are of opinion that our judgment must be for the plaintiff as to such part of his complaint as relates to the river Yeo, and, as to the rest of the alleged causes of action, for the defendant.

Judgment accordingly.

See 3 Kent Com. 439, where the principle recognised in this case is explained and illustrated, and the leading American cases cited.

A riparian owner is entitled to all the water-power contained between the level of the surface of the stream where it first enters his land in its natural state, and the surface where it departs from his land; and such power may be occupied in whole or in part or not at all, without endangering the owner's claim, unless there has been an adverse occupancy, under the statute of limitations M'Calmont v. Whitaker, 3 Rawle, 84. The owner of land through which a watercourse passes has a right to the flow of the water in its natural course without diminution or alteration; and although his right may be qualified by the adverse use of another for the period prescribed by statute or allowed to raise a presumption of a grant, it is not qualified or affected by the mode or extent of his own use during any period of time. Buddington v. Bradley, 10 Connecticut, 213. See Cook v. Hull, 3 Pickering, 269; Anthony v. Lapham, 5 Ibid. 175; Butman v. Hussey, 3 Fairfield, 407; Arnold v. Foot, 12 Wendell, 330; Twiss v. Baldwin, 9 Connecticut, 291; Pugh v. Wheeler, 2 Dev. & Bat. 50; Davis v. Fuller, 12 Vermont, 178; Wadsworth v. Tillotson, 15 Connecticut, 366; Hendricks v. Johnson, 6 Porter, 472; Evans v. Merriweather, 3 Scam. 492; Heath v. Williams, 25 Maine, 209; Frey v. Witman, 7 Barr, 440; Hartsall v. Sill, 12 Penn. State Rep. 248; Cowles v. Kidder, 4 Foster, 364.

*PRIDEAUX *v.* BUNNETT. *Jan.* 14. [*613

The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order,—"Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff,—to the effect that the patent article would consume smoke and effect a considerable saving in fuel,—as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—

Held, That no such warranty could be implied; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price.

THIS was an action to recover the price of an article called "Prideaux's patent self-closing (or smoke-consuming) valve," for which the plaintiff had obtained a patent in the year 1854.

At the trial, before Cockburn, C. J., at the sittings at Guildhall, after the last term, it appeared that the plaintiff, who carried on business under the name of the "Smoke Prevention Company," issued cards which contained on the one side a statement of the price of the article and the royalties demanded for its use, and on the other the following representation or address:—

"The Smoke Prevention Company are happy to have it in their power to state, that, in all cases where they have been able to procure an accurate return of the consumption of fuel, a decided saving has been admitted to result from the application of the valve, so much so that its cost becomes a profitable investment, rather than an outlay.

"In some instances, they have been much gratified at being told by those who have adopted it, that they should save the cost of the valve, together with the royalty (for the whole term of the patent), in six months, and become large annual gainers by its use for the rest of the term; and not a few have congratulated themselves at finding that the effect of the compulsory enactment against smoke, in their individual cases, would be (much against *their anticipations) to confer a far from insignificant pecuniary benefit, which they would not otherwise have obtained. [*614

"As far as the evidence they have been able to collect enables them to judge, the saving by the use of the valve ranges from 10 to 15 per cent. Taking the lower figure (viz. 10 per cent.) as a safe basis for a calculation,—then, estimating the consumption per horse-power, to be 25 tons per year, worth at 1*l.* per ton, 25*l.*; the saving to a manufacturer having five boilers of 20 horse-power each, would be 250*l.* per annum; whilst, the total cost of the apparatus for five boilers, including royalty for the whole term of the patent, would only amount to 107*l.* 15*s.*, being, as before stated, less than half a year's saving from the use of the invention.

"When, however, it is *imperative to consume smoke*, the value of this apparatus becomes still more striking, by contrasting its saving with the loss attendant upon other plans for effecting the same object; when a difference of 30 per cent. will be found in its favour. Leaving out of view the 'feeding by machinery plans' (which have their own peculiar disadvantages), it may safely be asserted that none of the many plans,—various in name, but identical in principle,—for preventing smoke by admitting a continuous supply of air at the bridge, effect this object at a less cost of fuel than 20 per cent,—an estimate the moderation of which will be confirmed by every one who has had any practical acquaintance with their action; the usual result being much worse, as many have found to their cost.

"The yield of steam from a boiler is unquestionally increased by the valve."

Circulars were also sent out, with blanks to be filled by intended purchasers of the patent article, headed "Particulars required for the application of Prideaux's Patent Valve for the Prevention of Smoke."

*615] *The defendant, who, it appeared, had never seen the article, filled up one of the circulars, and enclosed it to the plaintiff in a note as follows:—

"Deptford, Sept. 3d, 1855.

"Gentlemen,—Please prepare us a smoke-preventing valve, [giving a drawing showing the dimensions of the furnace door to which it was to be applied]. These are to your own figures; and we shall make the necessary allowances, as you state, to admit of the valve going into our frame easily. BUNNETT & Co.

"The Smoke-Prevention Company."

The apparatus was fitted to the defendant's furnace; but, from some circumstances which did not appear, it turned out a complete failure. No fraud was imputed to the plaintiff: but it was insisted on the part of the defendant that the representations contained on the card, and in the circulars and invoice, amounted to a warranty that the patent article would consume smoke, and therefore it was contended that the case differed from Chanter *v.* Hopkins,(*a*) 4 M. & W. 399† (which had been

*616] *relied on for the plaintiff), inasmuch as the article sold there was a thing much in use and well known in the market.

The Lord Chief Justice ruled, that the representations relied on did

(*a*) In that case, the defendant sent to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following written order,—"Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right, 15*l.* 15*s.*: iron work not to exceed 5*l.* 5*s.*: engineer's time fixing, 7*s.* 6*d.* per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of a brewery, and was returned to the plaintiff. It was held (on fraud being imputed to the plaintiff) that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole 15*l.* 15*s.*, the price of the patent right.

not amount to a warranty, and that, this being the sale of a specific chattel, and no fraud being imputed to the seller, the plaintiff was entitled to recover.

A verdict having accordingly been found for the plaintiff, with leave to the defendant to move,

Edwin James, Q. C., now moved accordingly.—The question is whether the representations made by the plaintiff at the time of the sale, did not amount to a warranty that the article he sold as a "smoke-preventing valve" was that for which it purported to be sold. Chanter *v.* Hopkins was a totally different case: there, there was evidence that the patent article which was specifically ordered by the plaintiff, was in common use and was well known in the market by that description; whereas, here there was no evidence of the sort, or that the defendant had ever seen it, or knew anything of it but from the representations made by the plaintiff. [COCKBURN, C. J.—The card refers to a patent article; and the defendant intended to purchase the very thing.] There were no representations of any kind in the case of Chanter *v.* Hopkins; but the defendant sent the plaintiff a specific order,—"Send me your patent hopper and apparatus, to fit up my brewing-copper with your smoke-consuming furnace." [CRESSWELL, J.—Your argument would tend to fix every patentee with a warranty. COCKBURN, C. J.—In the case of a patent medicine which is advertised as a specific for a variety of ailments,—could you resist payment because you were not cured by it of one of the diseases mentioned in the advertisement?] That is a totally different case. [CRESSWELL, J.—Taking all the evidence together, is it not clear that the order *was given for the patented, the ascertained article?] The question is, whether the contemporaneous [*617 representations ought not to have been submitted to the jury as evidence of a warranty that the article was what it professed to be.

CRESSWELL, J.—I am of opinion that this case is governed by Chanter *v.* Hopkins. I am utterly unable to discover a literal, much less a substantial distinction between the two cases.

The rest of the court concurring, Rule refused.

COX *v.* LEECH. *Jan.* 14.

An attorney received instructions to sue forty-five underwriters for particular average loss on certain policies on goods which had been shipped to Calcutta, and there sold. Having written ineffectually to each of them, demanding payment, he (under an impression that the only defence to be set up was a supposed set-off against the broker in whose name the policies were effected) sued out writs in the Lord Mayor's Court, though he knew that that court had no power to issue a commission for the examination of witnesses abroad. The actions (after consolidation) being defended, and a commission to examine witnesses at Calcutta being found necessary, the proceedings in the Lord Mayor's Court was necessarily abandoned:—

Held, that the attorney was guilty of crassa negligentia, and disentitled to sue his client for the costs of such abortive proceedings; and that it was no answer for him to say (upon the argument of a rule to set aside a verdict which had been found against him), that the difficulty might have been got over by the removal of the causes by certiorari to one of the superior courts.

But, held, that he was entitled to recover in respect of the letters before action.

Quære, whether the 17th rule of H. 1853, which provides that, "if a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause," applies where the certiorari is obtained *by the plaintiff?*

THIS was an action brought by the plaintiff, an attorney, to recover from the defendant 66*l.* 9*s.* 8*d.*, the amount of a bill of costs incurred in certain proceedings in the Lord Mayor's Court, London, under the following circumstances:—

In the early part of the year 1853, the defendant, who is a manufac-
*618] turer at Stalybridge, in Lancashire, shipped *certain goods to Calcutta on board a vessel called the Lismoyne, upon which he caused three policies of insurance to be effected to the amount of 5980*l.* These policies were effected in the name of a broker,—one Gibson. Upon the arrival of the Lismoyne at Calcutta, it was found that the goods had sustained sea-damage to the extent of 923*l.* 16*s.* Accordingly, the defendant, through his agent Mr. Murray, made claims upon the underwriters (forty-five in number) for their respective proportions of the loss. After several ineffectual attempts to obtain a settlement of these claims, Mr. Murray, on the 28th of November, 1855, wrote to the defendant, as follows:—

"5, Austin Friars, 28th Nov. 1855.

"Dear Sir,—On referring to our letter of yesterday, we find, on speaking of the claims per James Booth, Lismoyne, and Esther, we say the *first two* are partially settled with the underwriters. It should have been the *first* and *last;* the claim per Lismoyne is untouched, owing to there being no Lloyd's agent's certificate of damage accompanying the documents, and no protest. Still, it is quite clear you have some claim against the underwriters; and we shall be glad if you will advise us what is to be done under the circumstances. We shall be glad to offer our suggestion as to the course we should pursue to bring the matter to a close, if you think fit to avail yourself thereof.

"G. MURRAY & Co."

The defendant afterwards wrote to Mr. Murray intimating his readi-

ness to receive any suggestion he had to make relative to the matter; and accordingly that gentleman, on the 6th of December, wrote as follows:—

"5, Austin Friars, 6th December, 1855.

"Dear Sir,—Since we addressed you last, we applied to and received from Mr. Gibson the stamped policies *per Lismoyne, James Booth, and Esther, and have again laid them before the underwriters. [*619 On one of the policies per Lismoyne the underwriters refuse to make a settlement: on the other they still have the matter under deliberation, but we quite expect also that they will decline. With the claims per James Booth and Esther we are making progress, and hope to get them all arranged without much difficulty.

"As regards the Lismoyne, we would suggest and advise that you instruct us to place the matter in a solicitor's hands; for, we quite believe it will be fruitless to make another attempt to induce the underwriters to settle: they do not even make any proposition to compromise the claims, which, at all events, we think they might have done. They have suffered a loss by Mr. Gibson's failing, and are annoyed at the heavy claims brought before them on these policies. By adopting the plan we recommend, we think you will bring the matter to a speedy and satisfactory close. Our solicitor is Mr. W. Cox, who is practically acquainted with insurance cases, and *who has just successfully obtained full settlement of a similar claim from the underwriters*, and to whom you cannot do better than authorize us to apply.

"G. MURRAY & Co."

Again, on the 8th of December, Mr. Murray wrote to the defendant, as follows:—

"5, Austin Friars, 8th Dec. 1855.

"Dear Sir,—The papers per Lismoyne are still before the underwriters: and we are still of opinion that a little show of *decision* will bring about some settlement satisfactory to you

"G. MURRAY & Co."

On the 11th the defendant, in reply, addressed Mr. Murray as follows:—

*"Stalybridge, 11th Dec. 1855. [*620

"Gentlemen,—If the underwriters still refuse to settle my claims per Lismoyne, please to place the matter at once in the hands of your solicitor, Mr. W. Cox, instructing him to take such steps as may be needful to obtain a settlement: but, before going to any *serious* expense, you will be good enough to communicate further with me. When Mr. Cox has considered the matter, I shall be glad to learn his opinion upon it.

"JOHN LEECH."

On the 13th of December, Mr. Murray accordingly consulted the plaintiff on the subject of the defendant's claims against the underwriters, and instructed him to take the necessary steps to enforce payment thereof,—at the same time telling him he believed the claims were similar to Chadwick's, referred to in the letter of the 6th of December. The plaintiff thereupon wrote to four of the underwriters, demanding payment of their respective proportions, and on the 17th of December commenced proceedings against them in the Lord Mayor's Court; and subsequently he commenced actions in the same court against the other forty-one. The actions were at the instance of the underwriters consolidated into four. On the 29th of December, Mr. Murray wrote to the defendant, as follows:—

"5, Austin Friars, 29th Dec. 1855.

"Dear Sir,—Since we last wrote you, we have had several interviews with Mr. Cox. The proceedings adopted up to the present time have been as follows:—1st. A written application for payment, addressed to four of the underwriters. The result of this, was, a reference to their solicitor, who asked for time to look into the matter; and, on the expiration of the period, as no satisfaction was afforded, the four underwriters were served with writs. 2d. Applications similar to above were
*621] *made to all the underwriters, and with the like results, as we are told *the whole of them were yesterday served with writs.* This *must* bring the matter to a speedy issue.

"G. MURRAY & Co."

The receipt of this letter was acknowledged by the defendant on the 23d of January, 1856; and on the 25th Mr. Murray addressed the defendant, as follows:—

"5, Austin Friars, 25th January, 1856.

"Dear Sir,—Mr. Cox informs us that the underwriters have consolidated the claims that have been made on them, *i. e.* that, if the matter goes on, the action will be against *one of them*, the rest abiding thereby. Mr. Cox cannot yet say that it is the positive intention of the underwriters to resist the claim. *If they do, a commission will have to be appointed to inquire into the case in Calcutta.* We suppose, should such be the course adopted, you can have no fear as to the result.

"G. MURRAY & Co."

On the 28th of January, Mr. Murray received the following letter, in reply:—

"Stalybridge, 28th Jan. 1856.

"Gentlemen,—Your favour of the 25th instant is duly to hand; and I note that you are sanguine as to the result of the action contemplated against the underwriters per Lismoyne. When Mr. Cox knows that it is the positive intention of the underwriters to resist the claim, you will

please let me hear from you before he proceeds further in the matter. If I decide to go on, and a commission has to be appointed to inquire into it at Calcutta, perhaps Mr. Cox can give me an idea as to the probable cost. I am not inclined to let the matter remain as it is; particularly as you think it so clear in my favour.

"JOHN LEECH."

*The plaintiff having on the 29th of January informed Mr. Murray that the underwriters had pleaded "never indebted," [*622 and that it would be necessary to take another step, that gentleman on the 5th of February wrote to the defendant, as follows:—

"5, Austin Friars, 5th Feb. 1856.

"Dear Sir,—So far as Mr. Cox has yet gone on with the actions against the underwriters per Lismoyne, there has been no disposition evinced on their part to meet you; and the only chance now is, that, when he proceeds to ask the court for a commission to establish the necessary evidence, they may then either settle or offer a compromise. Under these circumstances, therefore, it is necessary for you to determine the course you purpose to adopt, and, by a careful examination of all the facts, to see if your position is sound. Mr. Cox believes it will be needful to have the captain's evidence that the goods were damaged by sea-water. Will you, therefore, ask your Liverpool agent to inquire if he is in England; if not, when he is likely to be; and also ask them if they can obtain a loan of his protest for that voyage.

"G. MURRAY & Co."

Upon the receipt of this letter, the defendant wrote to Mr. Murray requesting him to forward to him all the documents connected with the claims, in order that he might go through them and make up his mind as to further proceedings. Having obtained them, the defendant placed them in the hands of his own solicitor, who afterwards settled the claims with the underwriters, paying their costs in the Lord Mayor's Court.

On the 5th of February the plaintiff applied to the registrar of the Lord Mayor's Court, and afterwards (on the 15th) to the recorder, for a commission (on the common-law side) to examine witnesses at Calcutta: but the application was refused.

*Finding that the defendant had taken the matter out of his [*623 hand, Mr. Cox sent in his bill, amounting to 66*l.* 9*s.* 8*d.*, and, after demanding payment, brought the present action; to which the defendant pleaded,—first, except as to 2*l.* 8*s.* 6*d.*, parcel of the money claimed, never indebted,—secondly, as to the 2*l.* 8*s.* 6*d.*, payment into court.

The sum paid into court was paid in respect of the following items in the bill:

	£	s.	d.
"1855. Dec. 13.—Attending Mr. Murray this day on his bringing the papers relating to your claim against many underwriters at Lloyd's on several policies of assurance of goods per Lismoyne, and receiving instructions to take the necessary steps to enforce payment	0	6	8
"Perusing and considering the papers and policies . .	0	13	4
"1856. Feb.—Attending Mr. Murray on his calling with letter from you on this matter, and requesting to have the policies sent to you, and handing same to him . . .	0	3	4
"18th.—Attending Mr. Murray on his calling, informing him of the present position of the action; also conferring on the letter received by him from you, requesting to be informed of my opinion with reference to your claims, and as to the same being affected by the fact that the policies were granted in the name of Alfred Gibson, and advising thereon	0	6	8
"Writing you very fully thereon	0	3	6
"March 1st.—Attending Mr. Murray on his calling, when he informed me that he had heard from you on the subject; and taking instructions to stay the proceedings for the *624] *present: also conferring as to the evidence of the captain, and advising that it would be necessary to obtain same	0	6	8
"April 16th.—Attending Mr. Murray on his calling, when he informed me that you had determined not to proceed with the actions, but requested to have the costs sent to you .	0	3	4
	£2	3	6

The cause was tried before Erle, J., at the last Summer Assizes at Guildford.

The plaintiff, who was examined as a witness, stated, that, in pursuance of the instructions he received from Mr. Murray, the defendant's agent, he commenced the proceedings in the Lord Mayor's Court, as he had done in the case alluded to in Murray's letter of the 6th of December; that, before he did so, he had ascertained, from inquiry of the registrar of that court and also of the recorder, that, though the court had power to issue "letters inquisitorial" (in the nature of commissions) for the examination of witnesses beyond the jurisdiction, on the equity side of the court, they had no power, without consent, to issue a commission on the common law side; but that, when he issued the summonses, he had no conception of any other defence than a set-off by the underwriters against Gibson, in whose name the polices were effected. And Mr. Brandon, the registrar, also stated, that, although

commissions were sometimes issued on the common law side, it was always by consent.

On the part of the defendant, an attorney who had practised in the Lord Mayor's Court for upwards of twenty-six years, stated that he had never known a commission issued on either side of the court, except by consent; and that, if a bill were filed for discovery, the plaintiff must pay the costs. And the defendant's attorney *stated, that the particular average on the policies in question (the amount being disputed by the underwriters) could only be settled by information from Calcutta as to the nature and extent of the damage the goods had sustained, the expenses of sale, &c.; that the only mode of doing that would be by a bill of discovery in the Lord Mayor's Court, and the issuing of letters inquisitorial, the expense of which would be from 200*l.* to 300*l.*; and that, on settling with the underwriters in this case on behalf of Mr. Leech, he had been obliged to submit to a deduction of 102*l.* for their costs,—which he thought a judicious settlement. [*625

On the part of the defendant, it was insisted that the suing in the Lord Mayor's Court for the enforcement of a claim which could only be established by means of a proceeding which could not be taken in that court except at a ruinous expense to the plaintiff, was such a degree of negligence as to disentitle the plaintiff to recover any costs.

For the plaintiff, it was submitted, that he was justified by his instructions in bringing the actions in the Lord Mayor's Court, and in assuming that the only objection on the part of the underwriters arose out of their claim of set-off against Gibson, as in Chadwick's case; and that, at all events, assuming that there was negligence, he was still entitled to recover in respect of the letters written to the several underwriters before action, the charge for which was 6*l.* 15*s.*

The learned judge was of opinion that there was evidence to show that a commission to examine witnesses at Calcutta would be necessary, and that there was no sound reason for thinking that the Lord Mayor's Court had power to issue such commission; that the instructions which the defendant received did not warrant his proceeding in the Lord Mayor's Court, unless that court was legally suited to the claim; and that there was evidence *to warrant the jury in finding that the defendant had been guilty of such a degree of negligence as to disentitle him to recover: and he accordingly directed a verdict for the defendant, reserving to the plaintiff leave to move. [*626

J. Brown, in Michaelmas Term last, in pursuance of the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff for 64*l.* 6*s.* 2*d.*, or for a new trial on the grounds,—first, that there was no such negligence or want of skill on the part of the plaintiff as to disentitle him to recover,—secondly, that he was at all events entitled to recover for the letters written before action brought,—thirdly, that the work was not wholly useless to the defendant —fourthly, that the judge

misdirected the jury to the contrary of the above points,—fifthly, that the verdict was against the evidence. He submitted, that, the Lord Mayor's Court having so recently been thrown open to general practitioners, and its course of proceeding not so well defined as that of the other courts, the plaintiff could hardly be held guilty of gross negligence or gross ignorance for being unacquainted with the fact that commissions for the examination of witnesses were not as of right granted on the common law side. [CRESSWELL, J.—A gentleman who assumes to practise in a particular court, warrants that he is reasonably conversant with its modes of procedure.] No doubt. But, the question is, whether the evidence showed a case of *gross* negligence. It was competent to the plaintiff to have removed the causes into a superior court; and then, according to the 117th rule of Hilary Term, 1853 (13 C. B. 30 (E. C. L. R. vol. 76)), the costs in the court below would have been costs in the cause. [WILLES, J.—Is that so, if the certiorari is applied for by the plaintiff who goes to the inferior court?] The words of the rule are general,—"If a cause be removed from an inferior court having *jurisdiction of the cause, the costs in the court below shall be costs in the cause." The objection, at all events, does not apply to the charge for the letters.

*627]

Bovill, Q. C., and *Honyman* now showed cause.—The first question is, whether the plaintiff was guilty of gross negligence. Was he not guilty of gross negligence, when he commenced proceedings, in an action which he must have known could not be sustained without a commission for the examination of witnesses at Calcutta, in a court by the practice of which he was bound to know that such a commission was obtainable only at an expense which must render the entire proceedings impracticable and unproductive? It is said the plaintiff's instructions were, to proceed in the Lord Mayor's Court. That, however, is not so: he was instructed "to take such steps as might be needful to obtain a settlement." But, assuming that he was desired by Mr. Murray to proceed in the Lord Mayor's Court, that did not, as was observed by Erle, J., dispense with the obligation on his part to use ordinary diligence. He chose to sue in a court with the practice of which he was imperfectly acquainted. He must take the consequences. No court has any inherent power to issue commissions for the examination of witnesses: it is only by force of certain statutes that it is done in the courts at Westminster: Regina *v.* Wood, 7 M. & W. 571.† The actions here clearly became fruitless in consequence of the plaintiff's negligence and want of skill. The case comes very nearly within the principle of a recent decision of this court,—Long *v.* Orsi, 18 C. B. 510 (E. C. L. R. vol. 86). There, an attorney received from O. & A., agents of C. L. & Co. of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O. & A.) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a

note stating them to be all *endorsed to C. L. & Co.* *The attorney thereupon brought the action in the names of O. & A., and dis- [*628 covering afterwards, when the bills were for the first time shown to him, that there was no special endorsement to O. & A., as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co.: and it was held, that the suing in the names of O. & A. without having first ascertained that they were in a position to maintain an action on the bills, was such *gross negligence* as to disable the attorney from recovering the costs of the abortive action. "The plaintiff," said Jervis, C. J., "when he commenced proceedings upon the bills in the names of Orsi & Armani, knew or had the means of knowing what the law of France required. It was his duty to see the bills before he took any steps. He would then have known that the action could only be brought in the names of Cusin, Legendre & Co., and so the expense of the abortive action he first brought would have been avoided." If an attorney, in conducting a suit, commits an act of negligence by which all the previous steps become in the result useless, he cannot recover for any part of the business done: Bracey *v.* Carter, 12 Ad. & E. 373 (E. C. L. R. vol. 40). The same was held in Stokes *v.* Trumper, 2 Kay & J. 232. With regard to the distinction attempted to be made as to the letters, it is to be observed that letters before action form part of the costs of the action; and only *one* is allowed,—Capel *v.* Staines, 2 M. & W. 850.† The particulars are for costs in the actions; and the payment into court was not applicable to the costs of the actions. The letters were clearly useless. As to the suggestion that the actions might have been removed into a superior court by certiorari, it seems at the least very doubtful whether the 117th rule of Hilary Term, 1853, applies to a case where the certiorari is issued at the suit of the plaintiff.

Norman, in support of the rule.—To disentitle an *attorney to recover his bill of costs for business done, on the ground of [*629 negligence, it must appear that the negligence was of such a description as to render the work wholly useless to the client: Potts *v.* Sparrow, 6 C. & P. 749 (E. C. L. R. vol. 25); Hill *v.* Featherstonhaugh, 7 Bingh. 569, 5 M. & P. 541; Huntley *v.* Bulwer, 6 N. C. 111 (E. C. L. R. vol. 37), 8 Scott, 325; Bracey *v.* Carter, 12 Ad. & E. 373 (E. C. L. R. vol. 40). Assuming that the special instructions he received did not justify the plaintiff in commencing the actions in the Lord Mayor's Court, there is no pretence for saying that it was any other than a prudent course to adopt. It being notorious that commissions had repeatedly issued from that court for the examination of witnesses abroad, was he bound to inquire whether they had been issued adversely or by consent? [COCKBURN, C. J.—Is he not bound to be cognisant of the practice of a court in which he professes to carry on business?] At all events, all would have been right if the causes had been removed into one of the superior courts by certiorari, which is matter of right,—Anonymous, 1 Ventr.

46; and then the plaintiff would have been entitled to the costs in the inferior court,—Reg. Gen. H. 1853, r. 117. [CRESSWELL, J.—Is it so clear that the plaintiff might have removed the causes by certiorari? Edwards v. Bowen, 5 B. & C. 206 (E. C. L. R. vol. 11), 7 D. & R. 709(a) (E. C. L. R. vol. 16), seems to show that some cause must be assigned for the removal. The cases seem to have been abandoned in the Lord Mayor's Court because it was not competent to that court to issue a commission. No suggestion was made by Mr. Cox at that time that the difficulty could be overcome by means of a certiorari. COCKBURN, C. J.—It is now suggested for the first time.] The particular course was not pointed out: for, the business was taken out of the plaintiff's hands; and the substituted attorney chose *to settle the *630] claims without insisting upon the costs. The plaintiff is clearly entitled to a verdict for the 6*l.* 15*s.* for the letters of application for payment before action. They were properly written, and would have been allowed if the proceedings in the Lord Mayor's Court had been abandoned, and fresh actions commenced in a superior court. [CRESSWELL, J.—Possibly the attorney may have a right to recover that charge as against his own client, though not as against the parties sued.]

COCKBURN, C. J.—I am of opinion, that, so far as relates to the costs incurred from the issuing of the process, there was evidence of negligence sufficient to sustain the verdict. If an attorney, with or without express directions from his client, takes out a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery by which the practice of that court is regulated, and to see that it is adequate to the carrying out of the objects of the suit. Here, it appears, that, not only did Mr. Cox not bring to bear upon the business of his client that competent degree of knowledge; but there is this further circumstance in the case,—that he had taken the trouble at an antecedent period to ascertain whether or not a commission for the examination of witnesses out of the jurisdiction could issue from the Lord Mayor's Court, and he had then been informed that on the common law side of the court it could not, but that it could only issue on the equity side, and that upon a bill filed, the expense of which was very considerable, and would fall upon the party seeking to obtain it. In that respect, therefore, I think that Mr. Cox was guilty of what the law calls crassa negligentia. From the nature of the actions he was instructed to bring, he *must* have known that he could not possibly proceed to trial without a commission. It is no answer for him now to say, *631] that, when this obstacle to the conducting the case to *a successful issue presented itself, it might have been got over by the removal of the cause by certiorari into the superior court,—first, because Mr. Cox never suggested such a course,—secondly, because that point

(a) 2 Russ. 153; 2 Sim. & Stu. 514. And see Perreau v. Bevan, 5 B. & C. 284 (E. C. L. R. vol. 11).

was not made at the trial. As far as regards the other part of the costs, however,—the letters written to the underwriters before any proceedings were taken,—I think the verdict ought to be entered for the 6*l.* 15*s.* It seems to me that these letters are distinguishable. They might have produced the desired result. The negligence occurred only at a later stage,—when the process was sued out of a court having no machinery adapted to the particular case.

CRESSWELL, J.—I entirely concur in what has fallen from the Lord Chief Justice.

The rest of the court likewise concurred.

Bovill, Q. C., asked the court to give some special direction as to the costs.

PER CURIAM.—We do not think it necessary to make any special order as to costs. They will follow the ordinary rule.

Rule absolute.

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*GILBERT *v.* CROSIER. *Jan.* 31. [*632

Upon a motion by a defendant for costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, on the ground that the plaintiff had without reasonable or probable cause made an affidavit in bankruptcy for a larger amount than he ultimately recovered, the verdict of the jury, though entitled to consideration, is not conclusive.

And, for the purpose of ascertaining whether or not there was reasonable or probable cause, the judge's notes of the trial may be had recourse to.

The plaintiff made an affidavit in bankruptcy, alleging the defendant to be indebted to him in the sum of 63*l.* 6*s.* At the trial, the jury returned a verdict for him for 10*l.* in addition to 37*l.* 10*s.* paid into court on a plea of tender. The judge who tried the cause reporting that he was of opinion there was evidence to show that the plaintiff was fairly entitled to recover the whole amount:—Held, not a case for costs under the 12 & 13 Vict. c. 106, s. 86.

THE defendant was on the 4th of October last served with a demand in bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict. c. 106), at the suit of the plaintiff, claiming payment of 63*l.* 6*s.*, being 7*l.* 14*s.* for goods sold and delivered, and for repairing and japanning a treacle-can, and 55*l.* 12*s.* for work and materials. The defendant, admitting his liability in respect of the 7*l.* 10*s.* and also his liability for the work and materials to the extent of 30*l.*, on the 7th, through his attorney, tendered to the plaintiff 37*l.* 14*s.*, in discharge of his claim. The plaintiff declined to accept the sum tendered, and on the 8th commenced an action to recover the 63*l.* 6*s.*, and on the following day caused an affidavit of debt to be filed in the Court of Bankruptcy, and summoned the defendant to appear in that court pursuant to the statute. The defendant attended and admitted his liability to the extent of the sum already tendered, and resisted the demand as to the rest. The defendant pleaded to the action never indebted and a tender of 37*l.* 14*s.* before action brought, and paid that sum into court. At the trial a verdict was found for the plaintiff for 10*l.* only beyond the sum paid in under the plea of tender.

Thomas, Serjt., on a former day in this term, obtained a rule under
*633] the 86th(a) section of the Bankrupt Law *Consolidation Act, calling upon the plaintiff to show cause why he should not pay the defendant his cost of suit, and of the application, on the ground that he had not any reasonable or probable cause for making the affidavit of debt to the amount sworn to. The affidavit upon which the rule was moved, stated that the plaintiff had contracted to do the work in question for 30*l.* The learned serjeant submitted, that, by analogy to the decisions upon the 43 G. 3, c. 46, s. 3, which had been held to be applicable to cases under this statute, the verdict of the jury was the test of the existence or absence of reasonable or probable cause: and he referred to Tipton *v.* Gardiner, 5 N. & M. 424 (E. C. L. R. vol. 36), and Lewis *v.* Ashton, 1 M. & W. 493.†

*634] *D. D. *Keane* now showed cause, upon affidavits stating that the work and materials in respect of which the plaintiff had brought his action were fairly worth the sum mentioned in the affidavit in bankruptcy; that the plaintiff and his foreman both swore at the trial that there was no contract to do the work for 30*l.*, as suggested by the defendant; and that the amount claimed was fair and reasonable.—The plaintiff has recovered 47*l.* 14*s.* out of 63*l.* 6*s.* The question is, whether he had reasonable or probable cause for making the affidavit for the larger sum. The defendant does not in his affidavit state that he did not owe the 63*l.* 6*s.*; but that he swore at the trial that the plaintiff had contracted for 30*l.* to do work for which he charged 55*l.* 12*s.* The finding of the jury negatives his statement as to the agreed price of 30*l.*, for they have given the plaintiff 10*l.* more. No doubt the decisions under the 43 G. 3, c. 46, s. 3, are applicable to cases under this statute, the language of the two being very similar: but, to render the plaintiff liable to pay costs, the difference of amount must be something substantial; and the verdict of the jury is not conclusive. In Graham *v.* Beaumont, 3 Scott, 287, 5 Dowl. P. C. 49, it was held, that, on a motion for costs under the 43 G. 3, c. 46, s. 3, the amount of the ver-

(a) Which enacts, "that, in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and, in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs, in like manner as a defendant may now by law have execution for costs in other cases.

dict is not the criterion by which the discretion of the court is to be guided. Tindal, C. J., there says: "The statute was not intended to apply to a case where the plaintiff might reasonably be supposed to believe he should be able to establish at the trial that his debtor owes him the sum for which he arrests him. It must not be a mere measuring cast. Neither do I agree that it is by the verdict of the jury that our discretion is to be guided, although some of the cases seem to have gone almost that length." [CROWDER, J.—The cause was tried before me; and I must confess I should not have been dissatisfied if the jury had given a much larger sum. COCKBURN, C. J.—I *think we need not trouble you any further, but will hear what my Brother *Thomas* can say in support of his rule.] [*635

Thomas, Serjt., and *Wood*, in support of the rule.—The power given to the creditor under this statute is very extensive, and its exercise should be jealously watched. The debtor against whom it is exercised is thereby placed in a situation of extreme peril. In dealing with this statute, as with the 43 G. 3, c. 46, s. 3, the court must necessarily be guided by the verdict. They will not look at what passed at the trial otherwise than as appears on the affidavits.(a) In Lewis *v.* Ashton, 1 M. & W. 493,† the plaintiff arrested the defendant for 42*l.* 5*s.* money lent, and proved on the trial admissions of the loan of 18*l.*, for which amount she had a verdict. On a motion to allow the defendant his costs under the 43 G. 3, it appeared from the plaintiff's affidavit that she had lent the defendant sums of money at different times amounting to the sum for which he was arrested, but it did not appear that she had any witness to or evidence of such loans, beyond the defendant's admissions as proved at the trial. The defendant swore that she had lent him only 1*l.* The court, *although believing from the affidavits that the whole sum was due*, and that the defendant's affidavit was false, held, that, as the plaintiff could have had no reasonable ground to expect that she could recover the whole debt for which she made the arrest, the defendant was entitled to his costs. [COCKBURN, C. J.—There, the plaintiff must have known that she could make no case against the defendant beyond 18*l.* But, here, the plaintiff could give evidence himself.] In Tipton *v.* Gardner, 5 N. & M. 424 (E. C. L. R. vol. 36), it *was held that an application for costs under the 43 G. 3, c. 46, on the ground that the plaintiff arrested for 35*l.*, and recovered only 19*l.* 19*s.*, was not answered by affidavits stating that the plaintiff's demand was reduced at the trial by false evidence of a witness, who was in fact a *partner* of the defendant, but stated herself to be his servant only. Lord Denman there says that the general rule is "that the amount of the verdict is primâ facie proof of [*636

(a) In Van Nyvel *v.* Hunter, 3 Ad. & E. 243, it was held, that, upon a motion under the 43 G. 3, c. 46, s. 3, it was not necessary that the amount of the verdict should be stated in the affidavits, but that it might be shown by the judge's notes.

the want of reasonable and probable cause to arrest for the amount sworn to." There are numerous cases to the same effect. A tender is equivalent to a set-off. [COCKBURN, C. J.—The only question for us is, whether the plaintiff had reasonable ground for thinking he could substantiate his claim to the extent of 63*l.* 6*s*. We have nothing to do with his exercise of discretion in going to the bankrupt court: that the legislature has enabled him to do.] The stringency and harshness of the proceeding is an ingredient for the consideration of the court. In Marshall *v.* Sharland, 15 Q. B. 1051 (E. C. L. R. vol. 69), it was held, that, under this statute, a plaintiff who has made an affidavit of debt against a defendant, a trader, and recovered less than the amount sworn to, will be ordered to pay the costs to the defendant, as having made the affidavit without reasonable or probable cause, if he has sworn to his own claim without allowing for a counter-claim of the defendant arising on the same transaction. "I will not," says Lord Campbell, "say, that, in every case, the creditor must necessarily mention the set-off; but, if he knows of any clear set-off which must be deducted from his demand and swears to his own debt without making the deduction, he does make the affidavit without reasonable or probable cause. The reasonable decisions on the statute 43 G. 3, c. 46, s. 3, are clearly importable into this case. Under that statute, it has been decided that a party is not to be held to bail for the amount of the plaintiff's debt, *637] without having credit for his *counter-claim. Now, affidavits under the statute 12 & 13 Vict. c. 106, may produce bankruptcy, and strip the debtor of all he has in the world: and I think the legislature did not mean to give such power to a creditor, unless he stated in his affidavit the sum which he is ultimately entitled to recover, either by action or proof in bankruptcy. The words of the statute are explicit." And he afterwards adds: "The machinery of the statute in question is exceedingly stringent; and, consequently, good faith is the more required in setting it in motion."

COCKBURN, C. J.—I am of opinion that this rule must be discharged. I quite agree that a creditor who has recourse to the provisions in the bankrupt act for the purpose of compelling his debtor to pay his demand, incurs a very serious responsibility in swearing to the amount: and I also agree that the verdict of the jury is a material element in the consideration of whether or not the plaintiff had reasonable or probable cause for making the affidavit in the amount sworn to: but the verdict is not conclusive on the court, especially where the question in dispute is the value of work done. The judge who tried the cause reports to us, that not only had the plaintiff reasonable cause to think he should be able to establish his claim to the full extent, but that he himself thought the jury ought to have given a verdict for a much larger sum than they did. The impression on my mind from the facts, is, that the plaintiff had fair and reasonable ground for believing that

he should have recovered the full amount for which he called upon the defendant to appear in the Court of Bankruptcy, and consequently that there is no ground for the present application.

CRESSWELL, J.—I am entirely of the same opinion. The language of the 86th section clearly shows that the *legislature did not contemplate that the court, in dealing with the question of reasonable or probable cause, should be governed by the verdict of the jury. I am not satisfied that there was such an absence of reasonable or probable cause here as to induce me to visit the plaintiff with costs. [*638

WILLIAMS, J.—I am of the same opinion. I agree with what was said by my Brother *Thomas*, except as to his suggestion that a reduction of the amount by a tender and payment into court is to be regarded in the same light as a reduction by set-off. There is no analogy whatever between the two cases. In the case of a set-off, the plaintiff knows of the cross-demand against him, and should make allowance for it. But, why should he be put in a worse position because his debtor has thought fit to tender him a less sum than he ultimately recovers?

CROWDER, J.—I am of the same opinion. The case is not at all affected by the tender. The only question is, whether, upon the facts, the court are satisfied that the plaintiff had reasonable or probable cause for swearing to the amount he did. I must confess I see no reason for thinking that he had not. The jury, it is true, have thought fit to give him a verdict for about 25*l.* less than the sum he claimed. I thought he fairly proved the work done to the full amount he demanded, and I expected the jury would have given him a verdict for the whole. I am far from saying that they did wrong in returning the verdict they did: but I still think there was ample evidence to justify them in giving the larger sum.

Rule discharged, with costs.

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*LURY and Another *v.* PEARSON and Another. *Jan.* 28. [*639

By a charter-party, it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners: and the charter-party contained a stipulation that "any question or difficulty which might thereafter arise out of that charter-party should be decided by arbitration," in a manner pointed out.

An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence:—Held, not a case for the application of the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

ON the 5th of September, 1856, a charter-party was made between the plaintiffs and defendants for the letting of a steam-vessel called the Bordeaux for one year, upon the terms and conditions in the following charter-party:—

"London, 5th Sept., 1856.

"This charter-party witnesseth that Messrs. Lury & Hoyland, of London, merchants, and managing owners of the steam screw ship or vessel called the Bordeaux, of London, of the burthen of $\frac{1}{1}\frac{6}{2}\frac{2}{2}$ tons register (and eighty horse-power) or thereabouts, let the said ship to freight or hire to Messrs. Z. C. Pearson & Co., of Hull, shipowners, (hereinafter called 'the charterers,') for the term of one year, to commence from to-day; and the said vessel is hereby placed at the charterers' absolute disposal, for employment in carrying cargo between safe European ports, for the period of one year, upon the terms and conditions following:—Provided always that the cargo to be from time to time taken and received on board the said steam-vessel shall not be of a nature to cause damage or injury to the hull or machinery of the said vessel, and shall not be more than she can safely and reasonably carry and stow over and above her stores, tackle, provisions, furniture, and fuel.

"It is also agreed that the owners are to employ a well known and competent surveyor to examine and survey the said vessel, her engines, boilers, machinery, and appurtenances, at any time the owners may wish to do so during the period of this charter-party, and to require all necessary repairs to be done at the charterers' expense.

*640] *"It is also agreed that the said charterers shall at their own costs and charges effect a satisfactory insurance of the said vessel and appurtenances *on account of the owners*, and in such office or offices, or by and with such company or companies or individual underwriters at Lloyd's, as may be satisfactory to the owners, by policies in the ordinary form and against the ordinary risks, but including what is usually called 'the running-down clause;' and such policy or policies shall be *either in the names of the owners or as they may prefer*, and the same shall be to the extent of 9000*l.* for the period of twelve calendar months; *and such policy or policies of insurance shall be delivered to the owners*, and shall be their property, and at the time when they are delivered it shall be shown to the satisfaction of the owners that the premiums of insurance have been paid, or that credit has been given for the same to some other person or persons than the owners.

"And that the said charterers shall and will pay or cause to be paid unto the owners, their executors, administrators, or assigns, in full for the freight or hire of the said steam-vessel for the said service, at and after the rate of 145*l.* per calendar month (less a rebate of three months' discount on one-half of such payment, at the rate of 5 per cent. per annum), and so in proportion for less than a calendar month; such pay or freight to commence on this 5th of September, 1856, and continue until the expiration of the said service; and the said freighters expressly undertake and agree with the owners to re-deliver the said steamer, her engines, boilers, machinery, and appurtenance, in the

same efficient condition as they are hereby acknowledged to be in (reasonable wear and tear excepted) as aforesaid, at the expiration of the one year, in some convenient place in the port of London. And in the event of not making such re-delivery as aforesaid at the expiration of the said year, then the said *charterers agree to pay for each and every day of retaining the said vessel, at the rate of 5*l.* during the first month, and so in proportion for less than a month, and at the rate of 10*l.* during the second and each subsequent month; and that the said freight shall be paid monthly, on the last day of each month during the said full term of one year; and to effect satisfactory insurance in manner aforesaid for such extra time. [*641

"The said charterers are to have the sole appointment of the master, engineers, and all such persons as shall be necessary for the safe navigation of the said steam-vessel; and such master, engineers, and other persons shall be considered as the agents and servants of the charterers; but, nevertheless, the master and engineers shall be approved by the owners, if they desire to do so, before being appointed by the charterers: and the charterers shall bear and pay the wages of the master, engineers, and such other persons as aforesaid, and shall provide at their own costs all fuel, stores, provisions, ballast, and water, and pay all port-charges and pilotage, harbour-dues, light-dues, and any other expense consequent on the employment of the said steam-vessel; and that the charterers shall not during the said term of service load or discharge the said vessel whilst on the ground, or lay her on the ground when laden; and the said charterers shall not employ the said steam-vessel in any contraband of war or unlawful trade, or use or navigate her in any way or manner whereby the vessel or her appurtenances may be seized, or the owners thereof made liable to any loss or damage. And, in case of loss of the said steam-vessel by tempest or other contingency beyond the control of the said charterers, the rent or hire thereof shall cease from the day of such loss, or, if the actual day of loss cannot be ascertained, from the expiration of the calendar month on which she was last seen, or left port.

"And that the said Messrs. Lury & Hoyland, as owners, *shall not be in any wise liable or responsible for any damages done or sustained by the said steam-vessel, her engines, boilers, machinery, tackle, and appurtenances, but shall be held harmless and indemnified by the charterers for all such damages, or the consequences thereof, beyond what is not recoverable from the underwriters: Provided always, and it is understood and agreed between the parties, that, although the absolute possession of the said steamer and appurtenances is given by this charter-party to the charterers, that, nevertheless, in case of any default of payment of the freight or hire thereof for ten days after the same shall become due, the owners shall be at liberty, if they think fit, to demand and resume possession of the said steamer, and, on such [*642

possession being demanded, the owners shall be considered to have resumed possession, and shall have the same lien on the vessel and cargo for the freight due, as if the absolute possession had all along remained with them.

"It is agreed this charter-party is not to be assigned by the charterers, without the consent in writing of the owners. Should the said steamer meet with any accident to cause her to undergo repairs, and should the said steamer be under repair more than fourteen days, then the owners hereby consent to make a reduction of one-half of the amount of hire for such period of excess of days beyond the fourteen days only: Provided always, that the said charterers give due notice in writing to the owners at the time of such repairs taking place. The charterers to have liberty to remove the water-tanks if they desire to do so during the time of the said charter, and to replace them in the said steamer on her re-delivery.

"The charterers are to appoint, and do hereby appoint Mr. T. E. Snooks, ship-builder, of Millwall, as their surveyor and arbitrator, who is to judge of the condition of the said steamer, and her engines, boilers, *643] and *machinery, &c., both at the present time and also on her re-delivery: and Messrs. Lury & Hoyland do in like manner hereby appoint Mr. Bayley, of Cowper's Court, Cornhill, as their surveyor and arbitrator, who is to judge of the condition of the said steamer, and her engines, boilers, machinery, &c., both at the present time and also on her re-delivery: and the decision of these two gentlemen is to be binding on both owners and charterers; but, in case of any difference of opinion between the above two arbitrators, then the opinion of Lloyd's surveyor at Hull, who may be employed to survey the said vessel, is to be final and binding on both charterers and owners.

Any other question or difficulty which may hereafter arise out of this charter-party is to be decided by arbitration in like manner.

(Signed) "Z. C. PEARSON & Co.
"LURY & HOYLAND."

In pursuance of the above charter-party, the defendants effected insurances upon the Bordeaux for the sum of 9000*l*. The vessel, whilst prosecuting a voyage under the charter-party, was stranded. The policies were effected in the names of the defendants' brokers, who claimed a lien upon them for a debt due to them from the defendants; and, the defendants having refused to deliver them to the plaintiffs according to the stipulation contained in the charter-party, an action was brought against them to recover damages for such non-delivery.

Honyman, for the defendants, now moved for a rule to stay the proceedings, under the 11th section (*a*) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), on the ground that the action was brought in respect of a matter by the charter-party agreed to be referred. The

(*a*) Ante, p. 317.

affidavits upon which the motion was *founded, stated, that differences, questions, and difficulties had arisen between the plaintiffs [*644 and the defendants out of and relative to the terms of the charter-party, and to the construction thereof, and particularly as to the sufficiency of the policies effected by the defendants upon the said ship, and as to the damages claimed by the defendants of the plaintiffs in consequence of the plaintiffs' having at the time the charter-party was entered into represented the said ship to be in a very different condition to the state in which she ultimately proved to have been, and also as to the right of the defendants to retain the said policies until certain other claims of the defendants against the plaintiffs in respect of the charter-party were paid; that the defendants were willing to refer such matters to arbitration as provided by the charter-party; and that "the action was brought in respect of one of the differences, questions, or difficulties thereinbefore referred to as having arisen out of and relative to the terms of the charter-party, and was brought in respect of a matter by the said charter-party agreed to be referred to arbitration, and was not brought in respect of any other matter whatever.

Lush showed cause in the first instance, upon an affidavit, stating that the defendants had refused to deliver up to the plaintiffs the policies on the Bordeaux, claiming to be entitled to the amount paid for premiums; that it was not true that any difference, question, or difficulty other than the plaintiffs' right to the policies, had arisen between the plaintiffs and defendants on or relative to the terms of the charter-party, or to the construction thereof; and that no claim or demand of any kind had ever been made by the defendants on the plaintiffs for damages in consequence of any misrepresentation of or relating to the vessel, or any claim whatever except the claim before mentioned, to detain the policies for *payment of the premiums.—This is not a matter which the [*645 parties have agreed to refer; it is not a question or difficulty arising out of the charter-party:" and, if it were, it is not a case which the court would compel the plaintiffs to refer. [WILLES, J., referred to Wallis *v.* Hirsh, ante, p. 316, where the court refused to enforce a reference clause in a contract for the sale of linseed, there being a bonâ fide suggestion of fraud.]

Honyman.—In Russell *v.* Pellegrini, 22 Law Times, 121, the Court of Queen's Bench held such a case as this to be precisely one for a reference.

Lush.—In that case an action had been brought upon a charter-party, by the shipowner, for the stipulated freight, and a cross-action had already been brought by the charterer for damages alleged to have been occasioned by the unseaworthiness of the vessel. There is no suggestion here that there is any defence to the action.

CRESSWELL, J.—By the 11th section of the Common Law Procedure Act, 1854, the court is empowered, "upon being satisfied that no sufficient reason exists why the matters ought not to be referred to arbi-

tration," to make a rule staying the proceedings in the action. Now, in this case, I am not satisfied that there is no sufficient reason why the matters should not be referred. On the contrary, I am quite satisfied that they should.

The rest of the court concurring, Rule refused.

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*646] *HEMANS v. PICCIOTTO. *Jan.* 23.

Where a deed contains two covenants which cannot both be performed, they are dependent covenants.

The plaintiff declared upon a covenant whereby it was agreed that he should be paid 25,000*l.*, by monthly instalments, for certain services connected with the formation of a railway, and alleged for breach the non-payment of five of the monthly sums. The defendant pleaded, that, by the deed declared on, it was covenanted, that, in case for any reason the construction of the railway *should not be proceeded with*, the plans, specifications, &c., made by the plaintiff should be the property of the company, and, in case the whole 25,000*l.* should not then have been paid, it should be referred to one R. S. to say whether any and what further sum should be paid to the plaintiff; and averred, that, before any of the said five instalments became due, the said railway *was not proceeded with*, and that he was ready and willing to refer the matters to R. S. :—

Held, that the two covenants were not dependent covenants; and that the plea was a good answer to the declaration, although it did not aver that the plaintiff had notice (or knew) that the railway was not proceeded with.

THE declaration stated, that, by an indenture made on the 29th of May, 1854, between the directors of the South Eastern Railway of Switzerland, acting by John Sadleir, Robert Gillman, Thomas Hawes, Robert Keating, Anthony Norris, and Thomas Viner, the English portion of the general committee of management, of the first part, the said John Sadleir, John Masterman the younger, Moses Hayne Picciotto, James Rhodes, John Watkins Brett, and John Gurney, of the second part, and the plaintiff of the third part,—it was agreed, amongst other things, that the plaintiff would act as engineer in chief of the South Eastern Railway of Switzerland Company, in respect of the line of railway then about to be constructed, from Rapperschyl and Rorschach to Coire, with a branch to Glaris, in the cantons of St. Gal, Grisons, and Glaris, in Switzerland, and in that capacity to prepare all necessary plans, surveys, and sections of the said line, and also the drawings and specifications of the works, stations, and working stock; that he the plaintiff would set out on the ground the whole of the said line and works, and would provide all necessary engineering superintendence and assistants for the due inspection of the said work, its progress, and for insuring its proper execution, as well as that the conditions of the contract with the contractors were duly complied with;

*647] *that he the plaintiff would maintain a local office, with competent assistants in charge of every part of the works; that he the plaintiff would give proper certificates of the quantity of work executed by the

contractor from time to time, and generally do all such things as were usual and customary in such capacity of engineer in chief, in conducting and superintending the works of a line of foreign railway from the commencement to its conclusion; that, in consideration of the due performance of the above-named covenants, he, the plaintiff, his executors, administrators, and assigns should be paid and receive for all such engineering services as in the said indenture mentioned the sum of 25,000*l.*, by the instalments and in manner following, that is to say, the sum of 1000*l.* on or before the execution of the said indenture, and the sum of 500*l.* on the last day of the then present month of May, and the sum of 500*l.* on the last day of each succeeding month, until the plaintiff should have been paid in money the aggregate sum of 18,000*l.* on account of the said sum of 25,000*l.*; and that the plaintiff was willing to accept and take as and for the residue and difference between the said sum of 18,000*l.* so to be paid in cash as aforesaid, and the said sum of 25,000*l.*, three hundred and fifty shares, representing 7000*l.*, in paid up shares in the said company to that amount: and the defendant thereby covenanted with the plaintiff that he would be personally responsible, and would guaranty to the plaintiff the due payment of the said several monthly instalments of 500*l.* each: Breach, that, although the plaintiff had performed and fulfilled the said agreement in all things on his part to be performed and fulfilled, and all things had been done and happened to entitle him to be so paid the said monthly instalments, yet the plaintiff had not been paid, nor had he received for his services as such engineer, the said salary of 500*l.* per month; but, at the time of the commencement of this *suit,(*a*) there was and still remained due to him five several monthly instalments of such salary, amounting, to wit, to 2500*l.* [*648

Third plea,—that, by the said indenture, it was covenanted and agreed, that, in case of the death of the plaintiff at any time before the completion of the said line of railway, or in case, from any reason whatever, the construction of the said railway should not be proceeded with, then all the plans, specifications, drawings, and other writings prepared by him for the said works, or which should relate thereto, should immediately become the property of the directors of the said company for and on behalf of the said company; and, in case the whole of the said sum of 25,000*l.* should not then have been paid, it should be referred by the said parties thereto of the first and second parts and the plaintiff to the sole and final arbitration of R. Stephenson, Esq., who should have full power to decide and determine whether any and what further sum of money, in further part of the said sum of 25,000*l.*, should be paid to the plaintiff; and that, after the making of the said indenture, and before any one of the said five instalments became due, *the construction of the said railway was not proceeded with, and the said parties to the said*

(*a*) The declaration was dated the 3d of June, 1856.

indenture of the first and second parts had always been ready and willing to refer to the sole and final arbitration of the said R. Stephenson to decide and determine whether any and what further sum of money, in further part of the said 25,000*l.*, *should be paid to the plaintiff.*

The plaintiff joined issue, and also demurred to the third plea,—the ground of demurrer stated in the margin, being, "that the covenant mentioned in the declaration and in the plea respectively are separate and independent the one of the other, and that the latter *is not pleadable in bar to an action on the former." Joinder.

Manisty, in support of the demurrer.(*a*)—The plea in question is clearly insufficient, for not stating that the construction of the railway was discontinued or abandoned to the knowledge of the plaintiff, or that the directors gave him notice thereof. [CRESSWELL, J.—That rather savours of special demurrer.] It is matter of substance. It is not alleged that the directors determined never to proceed with the railway: and it is submitted that they cannot, by merely abstaining from proceeding with the works, disentitle the plaintiff to the stipulated monthly payments. To make this a good plea, it should have distinctly averred that the project was abandoned, and that the plaintiff had notice of that fact, and was required to refer the matter to Mr. Stephenson. Then, the covenant set out in the plea affords no answer to the breach of the covenant declared on: the two covenants are separate and independent. [CRESSWELL, J.—If both covenants cannot be performed, they cannot be independent covenants. CROWDER, J.—Is it not manifest that the one covenant depends upon the other?] If the court entertains a strong opinion, it will be idle to press the point, especially as the matter has been so fully discussed in the recent case of Scott *v.* Avery, 5 House of Lords Cases, 811.(*b*)

**649]* **Raymond*, contrà.(*c*)—The fact of the railway not being proceeded with was as much or more in the knowledge of the plaintiff than in that of the defendant. It was no part of the contract that notice should be given: therefore, the absence of notice is no answer to the defence set up. If the discontinuance of the works was a mere temporary discontinuance, an illusory or colourable non-proceeding with them,

(*a*) The points marked for argument on the part of the plaintiff, were,—"That the covenants mentioned in the declaration and in the third plea, were independent the one of the other; that the third plea was bad in substance, in this, that it did not allege that the plaintiff ever had any notice that the construction of the railway could not be proceeded with, and also in this, that the plea did not allege that the plaintiff was ever requested to refer it to Mr. Stephenson to decide what further sum he should be paid."

(*b*) See Avery v. Scott, 8 Exch. 487.†

(*c*) The points marked for argument on the part of the defendant, were,—

"That the covenant mentioned in the declaration, and for the breach of which the action is brought, and the covenant mentioned in the plea, must be construed together, and that the latter governed the former; and that, as the construction of the railway was not proceeded with before any one of the instalments became due, it should have been referred to Mr. Stephenson to decide whether any sum, in further part of the 25,000*l.*, should be paid to the plaintiff."

the plaintiff might have traversed it. The plea is in the very words of the covenant,—that "the construction of the said railway was not proceeded with." How can the court say that those words mean something different in the plea from what they import in the covenant? If the parties have mutually agreed to select a referee to determine the remuneration to be paid to the plaintiff in a given event, there is no hardship in holding them to be bound by the bargain.

Manisty, in reply.—Under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, where it is sought to obtain the benefit of the arbitration clauses, an arbitrator must be appointed, and notice given to the other party. So, here, it is not enough for the defendant to aver in his plea that he was ready and willing to refer the matter in question to Mr. Stephenson: he should have gone on to allege that the plaintiff had notice of the existence of the state of facts that rendered it necessary to call in the aid of the referee.

*Cresswell, J.—I am of opinion that the third plea in this case is a good answer to the declaration. The declaration is [*651 founded upon a covenant under which the plaintiff is to be paid certain monthly sums for certain services in connexion with the formation of a railway. The plea shows that the covenant declared on was not an absolute covenant for the payment of those monthly sums in all events, but for their payment only in the event of the work proceeding; because the indenture contains another covenant or stipulation, that, in case, from any reason whatever, the construction of the railway should not be proceeded with, all the plans, specifications, &c., prepared by the plaintiff for the works, should become the property of the directors, and, in case the whole of the stipulated sum of 25,000*l.* should not have been paid, it should be referred to Mr. Stephenson to determine whether any and what further sum should be paid to the plaintiff: and then the plea proceeds to aver that the construction of the railway was not proceeded with, and that the covenantors were ready and willing to refer. That has happened, therefore, upon which the covenant mentioned in the plea was to attach. I think the defendant is entitled to judgment.

Crowder, J.—I am of the same opinion. The third plea sets out the covenant upon which the defendant relies for his defence, and, following the very language used in that covenant, avers, that, before any one of the five instalments claimed by the plaintiff became due, the construction of the railway was not proceeded with, and that the parties to the covenant were ready to refer in the manner stipulated for. I think that was the only averment that could properly be made. There is nothing about notice in the covenant.

Judgment for the defendant.

*652] *DOBSON and Another *v.* HUDSON and Another. *Jan.* 23.

The plaintiffs contracted with the defendants to fit up for them the 'tween decks of an emigrant-ship, the work to be done to the satisfaction of the commissioners' surveyor, and to be paid for at the rate of 15*s.* "per statute adult:"—

Held, that the plaintiffs were only entitled to be paid at the stipulated rate for so many statute adult berths as the ship ultimately sailed with, and not for berths which had been erected and removed by order of the surveyor; and that they were not entitled to charge as extras those incidental accommodations which the passengers not required, inasmuch as they were either included in the contract, or not authorized by the defendants.

THIS was an action for work and materials, money paid, and money found to be due from the defendants to the plaintiffs on accounts stated.

Pleas,—first, except as to 36*l.* 2*s.* 6*d.*, parcel, &c., never indebted,—secondly, except as to the said sum of 36*l.* 2*s.* 6*d.*, parcel of the money claimed, payment before action brought,—thirdly, as to the 36*l.* 2*s.* 6*d.*, payment into court.

Replication, joining issue on the first and second pleas, and taking the 36*l.* 2*s.* 6*d.* out of court in satisfaction pro tanto.

The cause was tried before Willes, J., at the sittings in London after the last term. The facts were as follows. The plaintiffs (Dobson & Hegarty) are ship-joiners at Wapping; the defendants (Messrs. Hudson & Foster) are provision merchants and contractors for ships' fittings, at Sunderland. The plaintiffs' claim, as endorsed upon the writ of summons, was as follows:—

"1855. June and July. For work done on board the ship Chowringhee, and materials provided by the plaintiffs for the defendants, the full particulars whereof have already been delivered by the plaintiffs to the defendants	237	10	0
"Cash on account	160	0	0
	£ 77	10	0"

*653] *Pursuant to a judge's order, the endorsement on the writ of summons was amended, by the addition of the following items:—

	£	*s.*	*d.*
"June, 1855. Cutting holes in watercloset . . .	0	7	6
July, 4. Fourteen 9½ inch prismatic deck-lights . .	1	18	6
One 4 inch brass ventilator, and screws .	0	15	6
Four shipwrights one day each letting in deck-lights	1	10	0
Watercloset	3	10	0
Three fathoms dunnage wood . . .	3	15	0
	£11	16	6"

The Chowringhee was the property of one Gregg, of Belfast, who, on the 31st of May, 1855, chartered her to the Colonial Land and Emigration Commissioners to proceed with emigrants from London to Sydney. By that charter, Gregg undertook to fit up the 'tween decks and provide everything for the emigrants, for a certain sum.

Having so chartered the vessel, Gregg on the same 31st of May entered into the following agreement with the defendants:—

"137, Fenchurch Street, London. 31st May, 1855.

"This agreement made this day between Mr. James Cranston Gregg, of Belfast, of the one part, and Messrs. Hudson & Foster, of Sunderland, of the other part, witnesseth, that Hudson & Foster agree to sell and J. C. Gregg agrees to purchase the emigrants' stores, &c., for the ship Chowringhee, now chartered by Her Majesty's emigration commissioners for the port of Sydney, the whole to be shipped free on board the said vessel in the London Docks, and to consist of (say) emigrants' stores, fire-hearth, medicines, baking-ovens, coals, coke, and *charcoal, mess utensils, medical comforts, lamps, candles, and water-casks, with fittings, plumbing, screens, baths, and everything comprised in the commissioners of emigrants schedule (except a fire-engine), without any extras whatever; the whole to be shipped and fitted *to the entire satisfaction of the surveyor to the emigration commissioners, and subject to their approval.* For and in consideration of the foregoing, J. C. Gregg agrees to pay to Hudson & Foster the sum of 7*l.* 5*s.* *per statute adult*, as per government scale, say, by his acceptance at six months' date from day of vessel's clearance at the Custom-House, London. [*654

"Hudson & Foster,
"J. C. Gregg."

"Witness, C. G. Service."

The defendants, on the same day, and after communicating to them the above agreement, entered into a contract with the plaintiffs for the fitting up of the 'tween decks, and one of the plaintiffs thereupon signed the following undertaking, which was assented to by the defendants:—

"91, St. George's Street, St. George's East.

"Messrs. Hudson & Foster.

"Gentlemen.—I hereby undertake to fit up the between decks of the ship Chowringhee for government emigrants, to provide all materials and labour, viz. all plumbers' and joiners' work, for the sum of 15*s.* per statute adult,—*the whole to be done to the satisfaction of the emigration commissioners.* "John Dobson, Jun."

"May 31, 1855."

Pursuant to this contract, the plaintiffs proceeded to do the work, under the inspection of the commissioners' surveyor; but, in consequence of fewer double berths being required than was at first antici-

pated, the plaintiffs, by order of the surveyor, took down thirty-six of them, and erected in their place forty-four single berths.

*655] *The plaintiffs' claimed to be paid at the rate agreed upon for *all* the berths they were at the expense of putting up under the orders of the commissioners' surveyor, including those which they had been ordered to pull down; and they sent in the following account:—

"Messrs. Hudson & Foster

"Drs. to Dobson & Hegarty.

	£	s.	d.
"1855. To building 276 single and double berths on board the ship Chowringhee, at 15*s.* per head . .	207	0	0
"To taking down schoolmaster's cabin, and rebuilding same with double berths, tables, shelves, and washstand complete for family	5	0	0
"To taking down matron's cabin, and altering same, with fittings complete	3	10	0
"To taking down, altering, and rebuilding 36 double berths to ship's side for 44 single men, with tables, seats, shelves, &c., complete, at 10*s.* each	22	0	0
	£237	10	0
"Cr. by cash on account . .	160	0	0
	£77	10	0

On the part of the defendants, it was insisted that they were only chargeable in respect of the erection of so many berths as they had authorized the plaintiffs to erect, viz. so many as the vessel was capable of carrying. The vessel actually sailed with 261½ statute adults.

The learned judge directed the jury to find a verdict for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter the verdict for them, if the court should be of opinion that there was

*656] no *evidence to support the verdict for the plaintiffs beyond the amount paid into court.

Overend, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly, or for a new trial on the ground that the verdict was against the evidence.

Shee, Serjt., and *Salter*, now showed cause.—Having entered into the contract with Gregg for the hire of the ship Chowringhee,—which was produced and read at the time,—the defendants enter into the contract declared on. Under that contract the plaintiffs are clearly entitled to recover for all the work that was done, viz. the 276 berths. The work was done under the authority of The Passengers' Act, 1852 (15 & 16 Vict. c. 44). By the interpretation clause, s. 3, "statute adult" is declared to mean "a passenger of the age of fourteen years or upwards, or two passengers above the age of one year and under that of fourteen."

The 12th section limits the number of passengers to be carried in passenger ships, and imposes a penalty for an excess. The 16th section enacts that "no passenger ship shall clear out or proceed to sea unless she shall have been surveyed, under the direction of the emigration officer at the port of clearance, but at the expense of the owner or charterer thereof, by two or more competent surveyors, to be appointed by the colonial land and emigration commissioners for each port at which there may be an emigration officer, and for other ports by the commissioners of customs, nor unless it shall be reported by such surveyors that such passenger ship is in their opinion seaworthy, and fit in all respects for her intended voyage." By s. 18 it is provided that the berths shall be of dimensions not less than after the rate of six feet in length and eighteen inches in width for each statute adult, and shall be sufficient in number for the proper accommodation of *all the passengers contained in the lists of passengers hereinbefore (s. 13) required [*657 to be delivered by the master of the ship." Section 21 requires a sufficient space to be set apart for an hospital. Section 22 enacts that "no passenger ship shall clear out or proceed to sea unless fitted, to the satisfaction of the emigration officer at the port of clearance, with at least two privies, and with two additional privies for every 100 passengers on board, which shall be maintained in a serviceable condition throughout the voyage." And s. 22 enacts that "no passenger ship having on board as many as 100 statute adults shall clear out or proceed to sea without having on board an adequate and proper ventilating apparatus, to be approved by the emigration officer at the port of clearance, and fitted to his satisfaction; and, in every passenger ship, the passengers, whatever be their number, shall at all times during the voyage (weather permitting) have free access to and from the between decks by the whole of each hatchway situate over the space appropriated to the use of such passengers: If, however, the main hatchway be not one of the hatchways appropriated to the use of the passengers, or if the natural supply of light and air through the same be in any manner unduly impeded, the emigration officer at the port of clearance may direct such other provision to be made for affording light and air to the between decks as the circumstances of the case may, in his judgment, appear to require; and, in case of non-compliance with any such directions, or in case such ship shall be cleared out or proceed to sea without such ventilating apparatus, the owner, charterer, or master of such ship shall be liable to a penalty not exceeding 50*l.* nor less than 20*l.*" The contract being for work to be done on board an emigrant ship, must be taken to have been made with reference to the statute, and that requires that the fittings between decks for the accommodation of passengers shall be done *under the inspection and to the satisfaction of the surveyor to the commissioners. The fair meaning [*658 of the contract, therefore, is, that the plaintiffs were to construct and to

be paid for as many berths as the commissioners or their surveyor should require to be put up. Then, the ventilation, water-closets, and other fixtures and fittings were clearly within the contract: these were things without which the vessel would not have been permitted to sail. They were essential for the use of the emigrants occupying the 'tween decks.

Overend, Q. C., and *Chandler*, in support of the rule.—Both parties must be taken to have been cognisant of the duties imposed upon them by the statute in respect of the fittings, and the contract must be taken in connexion with the act. The defendants, therefore, can only be liable for the number of statute adult berths erected under the contract to the satisfaction of the surveyor; and not for those which may have been erected and pulled down or altered because not done to his satisfaction. With regard to the ventilation and the water-closets on the upper deck, if they are within the contract as incidental to the work contracted for, they are comprised in the stipulated payment of 15*s.* per statute adult berth; if not, their construction was not authorized by the defendants, and they cannot be called upon to pay for them.

CRESSWELL, J.—I am of opinion that this rule must be made absolute. By the contract, the plaintiffs undertake for a given sum per statute adult to fit up the between decks of the Chowringhee for the conveyance of government emigrants. They, therefore, undertake to do everything necessary to fit her for an emigrant ship. I think we may fairly take into account the act of parliament. We must presume that they under-
*659] took to do the *work according to law. To that extent, and no more, did the defendants employ them: and it is not pretended that there was any other contract express or implied, for any work not included in this. It may be that the commissioners or their surveyor called upon the plaintiffs to do more than was required by the statute. Now, the statute requires many things,—amongst others, a hospital, water-closets; ventilation in certain circumstances, which possibly may include lights. But the contract is for the fitting up an emigrant ship, and therefore is a contract to do all that is necessary to fit the ship for that purpose. Then, how are the plaintiffs to be paid? The sum stipulated for is 15*s.* per statute adult. The meaning of paying at so much per statute adult I take to be this, that the defendants were to pay at that rate for the number of statute adults who might ultimately be provided for under the direction of the surveyor. I find no provision in the contract for the expense of alterations resulting from the opinion or caprice of the commissioners or their surveyor. The plaintiffs undertook to do the work to the satisfaction of the surveyor. It follows, therefore, that they have received all they were entitled to, viz. 15*s.* for the number of statute adults ultimately provided for. With regard to the extras, they were either matters which the commissioners were justified in calling upon the plaintiffs to do, or they were not. If they were, they are included in the contract price; if not, they were done

without any authority from the defendants, and they cannot be called upon to pay for them.

WILLES, J.—I am of the same opinion. The contract is for the fitting of berths on the between decks of an emigrant ship, to be done to the satisfaction of the surveyor of the commissioners. That which was first done was not done to the satisfaction of the surveyor, and therefore is not to be paid for under the contract. The *plaintiffs were only entitled to be paid for the 261½ statute adult berths which were [*660 ultimately erected in conformity with the contract, that is, to the surveyor's satisfaction. Then the plaintiffs claim certain extras, for lights, water-closets, schoolmaster's cabin, &c. The answer to that, is, either the plaintiffs were bound to provide these things under the contract, or they were not: if they are things that by the statute were properly required to be done, they are within the contract; if not, they have been done without the defendant's authority. In either case, therefore, the rule must be made absolute to enter the verdict for the defendant. Rule absolute.

SMITH *v.* WOODFINE. *Jan.* 17.

Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the bona fides of the application, cannot be looked at for the purpose of explaining or contradicting the evidence given at the trial.

In such an action, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives.

THIS was an action for breach of promise of marriage brought by the plaintiff, who was the daughter of a retired clerk in a public office, against the defendant, a brewer at Hornchurch, in Essex.

The cause was tried before Willes, J., and a special jury, at the sittings in London after last Trinity Term. The promise and the breach being proved, evidence was given to show the defendant's means. This consisted principally of a statement by the father of the plaintiff, that the defendant had represented to him that he was possessed of property independently of his business, that *the brewery had been valued [*661 at 60,000*l.*, but was really worth 100,000*l.*, that it produced a profit of about 6000*l.* a year, and that there was property on the premises or in the funds worth from 16,000*l.*, to 19,000*l.* In addition to this, it was proved that the defendant had hired a house and land at Upminster at a yearly rent of 200*l.*, and had ordered a carriage. The will of the father was also put in; and from this it appeared that the defendant took only a moiety of the brewery.

The jury having returned a verdict for the plaintiff, with 3000*l.* damages,

The Attorney-General, in Michaelmas Term last, moved for a new trial on the ground of quasi surprise and excessive damages. The motion was founded principally upon the affidavits of the defendant, who swore, that, at the death of his father, he was possessed of 250*l.* only; that the entire property of which his father died possessed was not worth more than 88,000*l.*; that the property he derived under his father's will did not exceed the value of 12,000*l.*; that the entire profits of the brewery (of which he was entitled to the half) averaged about 750*l.* per annum; that he never informed the plaintiff's father that he possessed 16,000*l.* or 19,000*l.*, or any other sum in which he was beneficially interested, in the funds or elsewhere, or anything to that effect, or that the profits of the brewery were 6000*l.* a year; that the house and premises at Upminster were hired (furnished) for a year at a rent of 200*l.*, the landlord paying all rates and taxes; that the only carriage he had ordered was a phaeton for which he was to pay 80*l.*; that he was entirely taken by surprise at the statements made by the plaintiff's father at the trial as to his representations respecting his property; and that it never was his intention to break off the proposed match, but merely to post-
*662] pone it in consequence of some squabbling between *the plaintiff and himself and some members of their respective families as to the guests to be invited to the wedding. There were also the affidavits of a Mr. Shaw, the solicitor who managed the affairs of the defendant's late father, corroborating the statement in the defendant's affidavit as to the value of the property thereby bequeathed to him, and of one Mason, a valuer, confirming his statement as to the value of the brewery and plant.

CRESSWELL, J.—We cannot act upon the defendant's denial of the evidence given at the trial, inasmuch as he could not be examined as a witness upon an other trial. My brothers Crowder and Willes, however, think there should be a rule. My brother Willes considers that the conduct of some part of the defendant's family may have had a tendency unduly to influence the damages. For my own part, I must confess I think the question was one peculiarly for the jury. I have always felt it very difficult to interfere with the verdict of a jury upon a question of amount.

WILLES, J.—It seems to me that this is peculiarly a case for an imparlance.

A rule nisi having been granted,

Byles, Serjt., *Montague Smith*, Q. C., and *Unthank*, now showed cause, upon an affidavit of the plaintiff's father generally reiterating the statements made by him in his evidence at the trial, as to the representations of the defendant respecting the value of his property, and averring the affidavit of the defendant upon which the rule was moved to be wholly untrue.—Upon the evidence which was given at the trial, there could be no pretence whatever for disturbing the verdict: and there is nothing

*upon the affidavits upon which this rule is moved, to show that the jury have been misled by false evidence, or have acted under [*663 the influence of undue motives, or from misconception or mistake; consequently, there is no pretence for interfering with their verdict. There is no affidavit of surprise, properly so called: the defendant must have known that evidence would be given as to the nature and extent of his means, and was bound to come prepared to meet it. The affidavit now mainly relied on is that of the defendant himself, which the court can hardly give effect to, seeing that he is precluded by the statute 14 & 15 Vict. c. 99, s. 4, from being examined as a witness. [CRESSWELL, J.—That affidavit was received merely for the purpose for which a similar affidavit was received in Hawker *v.* Seale, 17 C. B. 595 (E. C. L. R. vol. 84), viz. for the purpose of rebutting any inference which might be drawn from the absence of it.] If that affidavit were admissible, it is in many respects answered by that of the plaintiff herself, which contradicts it in every material particular. [WILLES, J.—The statements in the defendant's affidavit contradicting the evidence given by the witnesses at the trial, being inadmissible, the affidavit of the plaintiff contradicting that affidavit must equally be inadmissible.] That being so, there are no grounds laid before the court to justify its interference with the verdict of the jury. Many authorities might be cited; but it will be sufficient to refer to two for the purpose of showing the principle which guides the court in matters of this sort. In Gough *v.* Farr, 1 Y. & J. 477,† it was held that the court will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages, unless they be so large as to induce the court to infer that the jury were actuated by undue motives, or acted upon a misconception of the facts. There, the plaintiff was the daughter of a clergyman, and the defendant the son and assistant of a silversmith: *and the jury returned a verdict for 250*l.*, which Bosanquet, [*664 Serjt., before whom the trial took place, reported to be under the circumstances "large." In discharging a rule which had been obtained for a new trial on the ground of excessive damages, Alexander, C. B., said: "This is an application to the court to grant a new trial, upon the single ground of the jury having awarded excessive damages. The power of granting new trials has been and is exercised in a variety of instances, in cases similar to the present; and it is a mistake to suppose that in doing so the courts at all infringe upon the province of juries, the constitutional tribunal to assess the amount of damages. Where the courts are of opinion, taking into consideration the circumstances of each case, that the jury have acted under the influence of undue motives, or of misconception, it is their duty to interfere, not by fixing the amount of the damages to be recovered, but by submitting the case to the consideration of a second jury; and, for my part, I think that the courts are in many cases bound to interfere." And Hullock, B., said:

"The principle which governs the courts in cases of this description, is, not whether they think the damages too large, but whether they be so large as to satisfy the court that the verdict was perverse, and the result of gross error, misconception, or undue motives. There are, I think, no circumstances in this case to warrant such a conclusion. Poverty is pleaded as a ground for inducing the court to interfere. I am not, from the evidence, satisfied that the defendant is unable to pay the damages: but, even if he were, that would not, I apprehend, be a ground for disturbing the verdict." Can it be said here that the verdict was the result of *gross error*, *misconception*, or *undue motives* on the part of the jury? or, is there anything now before the court to show even that the defendant is unable to pay the damages which the jury
*665] have awarded? In Wood v. Hurd, *2 N. C. 166 (E. C. L. R. vol. 29), 3 Scott, 368, 3500*l.* having been awarded by a jury as damages in an action of this sort, the court refused to set aside the verdict on the ground that the damages were excessive. In that case also the will of the defendant's father was produced at the trial to show the amount of property the defendant had succeeded to, and there were contradictory statements as to the interest he took under it. As to surprise, there clearly was none. No evidence was given at the trial, which the defendant might not have anticipated; it is not suggested that he has since discovered any fresh evidence; and the court will not grant a new trial merely for the purpose of giving the defendant a chance of mitigating the damages without calling witnesses. Of all cases, an action for a breach of promise of marriage is, from its very nature, and the unpleasant ordeal the plaintiff has to go through, the most inconvenient in which to grant a new trial.

Sir F. Thesiger, Q. C., *Montagu Chambers*, Q. C., and *Prentice*, in support of the rule,—admitting, that, in order to induce the court to make the rule absolute, they must satisfy them that there had been misconception on the part of the jury as to the facts or as to the means of the defendant,—submitted that the circumstances disclosed at the trial, and in the affidavits before the court, showed nothing to warrant the extraordinary and unreasonable amount of damages which the jury had awarded against the defendant.

CRESSWELL, J.(*a*)—I am of opinion that this rule should be discharged. It is not disputed that the plaintiff was entitled to a verdict: but it is said that the damages are extravagantly excessive, regard
*666] being had *to the position in life of the parties, and therefore there ought to be a new trial.

I am far from denying that there may be cases in which it may be the duty of the court to interfere with the verdict of a jury. If, for instance, it appeared that it had been obtained by means of perjury,

(*a*) Cockburn, C. J., had been counsel in the cause, and therefore took no part in the discussion.

that would be ground for setting aside the verdict. So, if it were shown that evidence was given which had taken the defendant by surprise, and which he could have had no opportunity to meet. It is said here that the defendant was surprised at the amount at which his property was estimated by the plaintiff's witnesses. It appears, however, that the evidence as to that consisted principally of repetitions of his own statements which even now are not denied, and the will of his late father, which was the only evidence that was fairly within the plaintiff's reach, and more, I think, than she was bound to give. But, at all events, it cannot be said that the plaintiff artfully relied on the statements of the defendant, and abstained from giving other evidence in her power, in order to mislead the jury as to the value of the defendant's property. Was it surprise that the question as to his circumstances was entered into? Certainly not: for, that is an inquiry that is invariably gone into in cases of this sort, and therefore it was his duty to be prepared for it. As to the statements made by the plaintiff's father, do these afford any ground for granting a new trial? These statements necessarily would be repeated if the case were to be sent to another jury, and would remain uncontroverted; for, the defendant cannot be called. It would be idle, therefore, to send the cause down again, there being no reason for believing that the plaintiff's father spoke other than the truth. It was the defendant's own fault that the facts before the jury remained unanswered. His mother was in court, and she might have been called to give the explanation as *to the value of the brewery which she has now given in her affidavit. [*667
The case, then, stands thus: There has been no perjury, and no fraud or misconduct on the part of the plaintiff to deprive the defendant of a fair opportunity of laying his case before the jury: nor is there any suggestion that the jury were acting under any prejudiced view, or that they misunderstood any particular piece of evidence. There has been no perjury, no surprise, no prejudice, no mistake. But it is said that the jury have awarded the plaintiff an unreasonable and excessive amount of damages. No legitimate ground being laid for it, it seems to me that we should be guilty of a most inconvenient and unconstitutional exercise of our power if we took upon ourselves to interfere with the discretion which the law has in a peculiar manner vested in the jury in cases of this sort. For these reasons, I am of opinion that the rule should be discharged.

WILLES, J.—The law as to breaches of promises of marriage is at least as old as the reign of William the Third, as appears by the case of Harrison *v.* Cage and Wife, Carth. 467, where, after verdict for the plaintiff, with 400*l.* damages, it was moved in arrest of judgment, "because this action would not lie upon the promise of marriage made by the woman, for, the law doth not intend that the man is advanced by marriage, and therefore, such a promise of marriage to him is of no

consideration in law, and by consequence no action can be founded thereon: but 'tis otherwise where a man promiseth to marry a woman, because marriage in the eye of the law is an advancement to the woman." To which it was answered, and so resolved per Curiam, "that here were reciprocal promises; and therefore, as her promise to him was a good consideration to make his promise obligatory, so by the same reason *668] his promise to her was sufficient *consideration to make her promise binding in this case as well as in any other mutual agreements." And the court "did not allow that distinction between the advancement of a man and of a woman in marriage." At the end of the case, the reporter adds this note:—"Nota. It had been moved before for a new trial, because of the excessive damages; but, upon reference to the Chief Baron Ward, who tried the cause, he certified that the promise of the woman was well proved, and that the damages were *more than he expected*, but that he did not think them *so excessive as to set aside the verdict.*" The report states that it was proved that the woman was worth 3000*l.* when the plaintiff courted her, and afterwards by the death of her brother worth double that sum. That which was laid down as law at that time is law at the present day. In Sedgwick on Damages, 2d edit., p. 208, it is said: "the clear and irresistible result of the authorities, is, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement." He then proceeds to notice an exception "in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title:" and at p. 210, he adds: "To the general rule another exception also exists, that of breach of promise of marriage. In this action, though in form ex contractu, yet, it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances, and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. 'The damages in this action,' says the Supreme Court of New York, in Southard *v.* Rexford, 6 Cowen, 254, 'rest in the sound discretion of the jury, under the circumstances of each *669] particular case.' *And this exception is perhaps one of the strongest proofs of the general rule." The learned author proceeds to cite certain American cases,—Torre *v.* Somers, 2 N. & M. 267, Coryell *v.* Colbaugh, Coxe, 77, Stout *v.* Parll, Coxe, 79, Greene *v.* Spencer, 3 Miss. 318, and Hill *v.* Maupin, 3 Miss. 323,—which, however, are only echoes of what has been decided in our courts. Again, at p. 368, the learned author says: "The action for breach of promise of marriage, as has been already said, though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to

the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage: Wells *v.* Padgett, 8 Barb. S. C. R. 323. From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,—Southard *v.* Rexford, 6 Cowen, 254,—subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages. So, where it appears that the promise was made by the defendant with a view to seduce the plaintiff, this will be allowed to go to the jury in aggravation.(*a*) So, also, it is held that the defendant may *show in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever: Johnson *v.* Caulkins, 1 J. C. 116. It is also settled, that, in this action, dissolute conduct on the part of the female *after* the promise (or before if unknown) discharges the contract altogether. Indecent conduct *before* the promise, if unknown to the defendant, or *after* the promise, goes in mitigation of damages."(*b*) Here it is said that the jury were prejudiced, and in consequence of that prejudice gave a verdict which they ought not to have given. The first inquiry I should think would be, whether that prejudice was caused by any wrongful act of the plaintiff. Looking at the evidence, it would appear that the jury based their verdict upon representations made by the defendant as to the value of the property. It was stated at the trial that he was possessed of means independent of the brewery, and that the brewery was valued at 60,000*l.*, and was worth 100,000*l.*, and produced a yearly profit of 6000*l.*, and that in addition he had from 16,000*l.* to 19,000*l.* worth of property on the premises. Not one of these statements is alleged by the defendant to be false; on the contrary, they are admitted on the affidavits to be true. It may be that these representations which were stated, and truly stated, by the plaintiff's father to have been made by the defendant, were made with a view to induce the plaintiff to consent to marry him. He now calls upon us to set aside the verdict because the representations so made by him with a view to their being acted upon by the plaintiff, were

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(*a*) Citing Paul *v.* Frazier, 3 Mass. 73; Greene *v.* Spencer, 3 Miss. 318; Hill *v.* Maupin, 3 Miss. 323; Buck *v.* Strain, 2 Bibb, 341; Whalen *v.* Layman, 2 Blackf. 194; Wells *v.* Padgett, 8 Barb. S. C. R. 323. The contrary has been held in Pennsylvania: Weaver *v.* Bachert, 2 Barr. 30. But, there, the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages: Baldy *v.* Stratton, 11 Penn. R. 316.

(*b*) Citing Boynton *v.* Kellogg, 3 Mass. 189; Willard *v.* Hone, 7 Cowen, 22; Palmer *v.* Andrews, 7 Wend. 142; Irving *v.* Greenwood, 11 E. C. L. 412; Capehart *v.* Carradine, 4 Strobhart, 42.

*671] untrue. It is doubtful, to say the least of it, whether *this might not be put upon the well known rule of estoppel under the bankrupt acts, where parties are precluded from denying facts which they have once asserted or admitted to be true. There is, however, no necessity to decide that point here; for the plaintiff, having given evidence of these representations of the defendant, proceeded to put in the will of his father, under which it was stated he acquired his property. The will so put in showed the value of the brewery and plant to be about 30,000*l.*; and it appeared that the defendant had only a share in it. I do not think the jury could possibly have fallen into any mistake. They must have taken that will into their consideration as well as the statements made by the defendant. The plaintiff clearly was guilty of no misconduct in producing this evidence; and I do not think that the jury, —a special jury of the city of London,—were at all likely to come to an erroneous conclusion as to the effect of that evidence. The amount of damages, it is true, is large: and I have remarked that considerably larger damages are usually given by special juries of the city of London in these cases than are given by those of any other place. It may be because they are accustomed to deal in large amounts themselves, and so are led to estimate wounded feelings higher than other juries do. But I have no means of estimating the propriety of their assessment, seeing that I am unable to satisfy my mind that they have either been misled or have acted from bad or corrupt motives. I therefore agree with my Brother Cresswell in thinking that the rule for a new trial must be discharged.

Rule discharged.

In addition to the American authorities cited in the foregoing case, see Bedell *v.* Powell, 13 Barbour, 183; King *v.* Kersey, 2 Carter, 402; Tubbs *v.* Van Kleek, 12 Illinois, 446; Greenleaf *v.* M'Colley, 14 New Hamp. 303; Greenup *v.* Stoker, 2 Gilman, 688.

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*672] *DALTON *v.* DENTON. *Jan.* 15.

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:— Held, that B. was not responsible.

THIS was an action to recover damages for an injury alleged to have accrued to the plaintiff from the negligent mooring of the defendant's vessel.

At the trial before Cockburn, C. J., at the sittings in London after the last term, it appeared that the plaintiff was a mast-maker occupying a wharf at Shadwell, and, at the time the accident in question happened, had some men at work upon a spar which overhung the river

in front of his wharf about twenty feet; that a collier belonging to the defendant was moored to the adjoining wharf, and so placed as that her bowsprit projected over the river fronting the plaintiff's wharf and over the plaintiff's mast; and that the tide falling caused the defendant's bowsprit to descend upon the plaintiff's mast and break it.

The jury having returned a verdict for the defendant, and leave having been reserved to the plaintiff to move to enter a verdict for him for the value of the mast (35*l.*) if the court should be of opinion that the defendant was under the circumstances liable,

Hawkins now moved accordingly, submitting that the defendant had been guilty of negligence in so mooring his vessel as to project over the front of the plaintiff's wharf, or in omitting to keep a look out and to move her when the state of the tide rendered it necessary.

PER CURIAM.—The plaintiff's choosing to occupy the waterway of the river by suffering his mast to project over it, imposed no duty upon the defendant, whose bowsprit had as much right there as the plaintiff's mast had. Rule refused.

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*MOORE *v.* WEBB. *Jan.* 27. [*673

To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fell-monger, and returning it polluted to the stream when so used, and also prescriptive rights for twenty and forty years respectively.

The plaintiff new assigned "that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified."

At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold.

Without leaving any thing to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues except the first and second:—

Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence.

And held, that the new assignment was well pleaded.

THIS was an action for polluting a watercourse.

The declaration stated that the plaintiff was possessed of a farm at Badeley, in the county of Suffolk, through which flowed a stream or watercourse; that the plaintiff ought to have had, and still ought to have, the use and benefit of the water of the said stream for his cattle and other purposes; yet that the defendant, on the 1st of July, 1856, and on divers other days, wrongfully polluted and disturbed the water of the said stream, so that it became foul and impregnated with noxious

substances, and the plaintiff's cattle were unable to drink it, and the plaintiff had been compelled to drive his said cattle to a distance for water, and had lost the use and benefit of the said water of the said stream, whereby his farm was greatly deteriorated: And the plaintiff claimed 100*l.*

The defendant pleaded,—first, not guilty.

Secondly, that the plaintiff ought not to have had, or to have, the use and benefit of the said stream, as in the declaration alleged.

Thirdly, that the defendant was, and still remained, seised in his demesne as of fee of and in a tan-house *and premises for carrying on the business of a tanner and fell-monger, adjoining the *674] said stream, and higher up than the plaintiff's farm, and that the defendant and all those whose estate he then had, from time whereof the memory of man was not to the contrary, had been accustomed to and ought to take the water of the said stream and use it in the said tan-house and premises, and to let off and empty into the stream all the water used in the said tan-house and premises, and which was and is made foul and impregnated with noxious substances necessary for carrying on the said business, and thereby to pollute and disturb the stream; and that the defendant, being so seised, and carrying on his business, used the water of the said stream at the said several times for the purposes of his said trade, and did let off and empty into the said stream the water necessarily used, and did thereby render foul and polluted the water so used, and the water so polluted passed through the plaintiff's farm, &c.

Fourthly, that the defendant was and still remained occupier of the tan-house and premises in the third plea mentioned; and that the occupiers of the said tan-house and premises, for twenty years before this suit had without interruption, and of right, taken the water and used it in the said tan-house and premises, and let off and entered into, and so polluted, &c. the water of the said stream, wherefore he did as he lawfully might, and the water so polluted ran through the said farm, &c.

Fifthly, a similar plea, setting up a forty years' user.

The plaintiff joined issue on all the pleas; and as to the third, fourth, and fifth, new assigned, that he sued not only for the grievances therein admitted, and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified.

*The defendant pleaded not guilty to the new assignment. *675] Issue thereon.

The cause was tried before Coleridge, J., at the last Summer Assizes at Ipswich. It appeared in evidence that the plaintiff was the occupier of a farm called the Holy Oak Farm, at Badeley, in the county of Suffolk, through which a stream or watercourse ran, the water of which had immemorially been used by the tenants of the farm for watering their cattle and for other purposes; that the defendant and his father and

grandfather successively had for at least thirty-six years carried on the business of tanners (and more recently that of a currier also) upon premises adjoining the stream, and higher up than the plaintiff's farm; that the waste water from the tan-yard had been accustomed to flow into the watercourse, though down to the year 1842 not to such an extent as to prevent the water from being used by the plaintiff; but that, since that time, the defendant's premises had been enlarged by additional buildings, and his business had been increased about fourfold, and the water of the stream had in consequence become so polluted and impregnated with noxious substances from the tannery that the plaintiff's cattle refused to drink it, and he was obliged to have them driven some distance to water, and was unable to use his farm adjoining the stream so beneficially as he had been accustomed to do.

On the part of the defendant it was submitted that the second, third, and fourth pleas were proved, and that there was no evidence to support the new assignment, which was limited to purposes ultra the trade purposes.

On the part of the plaintiff, it was admitted that the defendant was entitled to use the water of the stream for the purpose of his trade of a tanner and fell-monger, and to pollute the stream for that purpose to the extent to which it had been used twenty years ago, but to that extent only; and it was insisted that the pleas only *justified the immemorial user, and did not apply to the trade of a currier. [*676

To this it was answered that there was no evidence of any pollution of the stream, arising from the carrying on the trade of a currier.

The learned judge,—after giving the plaintiff an opportunity to amend the new assignment, which was ultimately declined,—directed a verdict to be entered for the defendant upon all the issues except those upon the first and second pleas, which were found for the plaintiff.

The Attorney-General, in Michaelmas Term last, obtained a rule nisi for a new trial on the ground that the learned judge misdirected the jury in directing them to find for the defendant upon the issues joined on the third, fourth, and fifth pleas, and upon the new assignment, or for judgment non obstante veredicto on those issues. He submitted that the defendant had in effect converted a limited into an unlimited right.

Byles, Serjt., *O'Malley*, Q. C., and *Couch*, now showed cause.—The third, fourth, and fifth pleas afford a complete answer to the complaint in the declaration; and that defence is not removed by the new assignment, which, if it means anything, means that the plaintiff charges a user of the stream beyond the purposes and the necessities of the defendant's business. It is not said, that, within the twenty or forty years, the actual user of the stream had been greater: that might have raised a question which does not appear to have been raised in any of the cases. [CRESSWELL, J.—The twenty and forty years depend upon

actual user. If a man has gone on increasing the user every year, he has not *actually* used the stream for the whole period in the manner he claims.] The stream was used at all times as it was wanted for the *677] purposes of the trade. It will be enough for the *defendant to establish his right to an immemorial user under the third plea. Can there be such a grant as that a man shall use the water of a stream to the extent needed for the purposes of his trade? Suppose a man has a grant of an easement for washing all his sheep levant and couchant on certain lands, could it be said that he was restricted from increasing their number to any extent? As far back as living memory went, it was shown that the ditch had been used for the discharge of the waste water from the tannery, as the exigencies of the business required. [CRESSWELL, J.—It is quite clear that my Brother Coleridge did not understand the plea in the extended sense now contended for. If it means what you say it does, the plea was not proved: there was no such extensive immemorial user; and it is impossible to suppose that the plaintiff's counsel would have declined to have the question put to the jury. And, if you read the plea in the more limited sense, it lets in the new assignment. WILLIAMS, J.—Assume that the learned judge ruled that it was opened to the defendant to show an immemorial grant, or right under Lord Tenterden's Act (2 & 3 W. 4, c. 71), to carry on the trade, and to make the water of the stream subservient to the exigencies of the trade for twenty years,—was that proved? It clearly was not admitted; and it was not put to the jury.] It is submitted that the pleas cover any extent of pollution that the plaintiff complains of. In Manning *v.* Wasdale, 5 Ad. & E. 758 (E. C. L. R. vol. 31), 1 N. & P. 172 (E. C. L. R. vol. 36), it was held, that the privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit a prendre, but a mere easement; and that such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken. [WILLIAMS, J., referred to Bowen *v.* Jenkin, 6 Ad. & E. 911 (E. C. L. R. vol. 33), 2 Nev. & P. *678] 87.] This is rather like the case of *Allan *v.* Gomme, 11 Ad. & E. 759 (E. C. L. R. vol. 39), 3 P. & D. 581. And see Luttrel's Case, 4 Co. Rep. 87 a, cited in Gale on Easements, 2d edit. 368. The third plea being proved, the question is as to the meaning of the replication. [CRESSWELL, J.—The first question is as to the meaning of the plea. Does it mean any more than a continuous user of the same character and to the same extent?] The case of Wright *v.* Williams, 1 M. & W. 77,† is very analogous, and it was never suggested that the pleas were bad on the ground of the extensive character of the right claimed. The true meaning of the new assignment is, that the defendant has used the stream for other purpose than those of his business. [WILLIAMS, J.—I understand it to mean that the pleas do not cover the

extent of pollution of which the plaintiff complains. The case of The Rochdale Canal Company *v.* Radcliffe, 18 Q. B. 287 (E. C. L. R. vol. 86), shows, that, if the plaintiff meant to rely upon an excessive user of the water, he was bound to new assign. I must confess I do not see how the plaintiff could have new assigned in any other manner than he has done here, if he meant to say that the user has gone beyond the limits of the grant.

Knowles, Q. C., *Prendergast*, Q. C., *Wells*, Serjt., and *Honyman*, in support of the rule.—The learned judge was clearly wrong in holding that the plea was proved: and, even if that were not so, the plaintiff would be entitled to succeed upon the new assignment, which follows the form given in the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sched. (B.) 55. The declaration complains that the plaintiff was possessed of a farm through which of right flowed a stream which was used by him for watering his cattle, &c., and that the defendant wrongfully polluted and disturbed the stream, so that the plaintiff's cattle were unable to drink it. To the grievance so complained of, the defendant pleads, *that he was seised of a tanhouse and premises adjoining the stream, and higher up than the plaintiff's farm, and that he and [*679 all those whose estate he had, had immemorially used the water of the stream in the said tanhouse and premises, and returned the water so used therein into the stream, and thereby polluted it. All that is traversed. What the defendant had to prove, in order to sustain his plea, was, not that the owners of the tannery had at all times been accustomed to use the stream for the purposes of their business, but that the owners of the tannery premises *of which he was possessed at the time of the committing of the grievances complained of* had been so accustomed. That was not proved. A large portion of the tannery premises were erected about twelve years ago: the immemorial right claimed clearly could not apply to those. The only mode in which the plaintiff could meet that enlarged claim, was, by new assigning as he has done,—not, as the learned judge seems to have supposed, that the defendant committed the grievances complained of *for other purposes* than those alleged in the plea, but that he did it in excess. [WILLIAMS, J.—Do you admit that twenty years ago the occupiers of the tannery took and fouled as much of the water as they wanted for the purposes of their trade?] It may be assumed that the fact was so: but that would be no evidence of a right on their part to throw in any quantity of filth that might arise from the extended premises. Either the plea must be taken in the sense suggested, and then it is not proved, and the plaintiff is entitled to a verdict upon the traverse; or the plaintiff is entitled to a verdict upon the new assignment, as in a case of Wood *v.* Ripley, where a similar question arose with reference to certain dye works in Yorkshire a short time ago. In Gale on Easements, 330, 332, it is said,—"As every easement is a restriction upon the rights of property of the

*680] owner of the servient *tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had." "So, too, by the civil law, a party entitled to a flow of water, for irrigation or other purposes, was not allowed to impart the use of it to his neighbours; nor, as it appears, even if he himself purchased the adjoining lands, would he be entitled to take a larger quantity of water than before for the use of his estate; for, in determining the amount of a servitude, regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement tigni immittendi, could not increase the number of beams which his neighbour was bound to support, and might be compelled to remove any additional ones inserted by him." The law is well laid down in Bealey v. Shaw, 6 East, 208, cited in an earlier part of the same work. There, the mills and works of the plaintiff and defendants were situated on the banks of the river Irwell. The persons under whom the defendants claimed had an ancient weir across the stream, by means of which they had an easement to divert a certain quantity of water. The plaintiff erected a mill lower down, to supply which he used the portion of water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir, in 1791, in such a manner as to divert an additional quantity of water, to the injury of the plaintiff's mill, and for this diversion the action was brought. At the trial, Graham, B., told the jury "that the important period for them to attend to, as to the question of right, was in 1791, when it was clear that an increased quantity of water had been drawn by the de-

*681] fendants from the river by means of the then newly *enlarged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claim; that persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use; that every such exclusive right was to be measured by the extent of its enjoyment, and, if the defendants had in 1791, taken more water from the river than had ever been done by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left for himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged, was a continuance of the injury, for which the action lay." A verdict having been found for the plaintiff on this ruling, a new trial was moved for, on the ground that "the evidence of exclusive enjoyment by the defendants and those

from whom they claimed, to as much of the water as they had occasion for, *increased from time to time as more was wanted*, from 1794 downwards, was evidence to be left to the jury of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty years' quiet enjoyment." In giving judgment, Lord Ellenborough said: "The general law as applied to this subject, is, that, *independent of any partial enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration;* but an adverse right may exist, founded on the occupation of another; and, though the stream be *either diminished in quantity, or even corrupted in quality, as, by means of the exercise of various trades, yet, if the occupation [*682 of the party so taking have existed for so long a time that will raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. Here, it appears, from 1724 downwards there has been a partial enjoyment of the water of the river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff, in 1787, comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years, without objection from any person. Suppose the question had arisen, then, on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of *all* the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works, and, for the very purpose of appropriating to themselves more of the water, they enlarged their sluice?" Grose, J., said: "The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it in respect to the premises which they occupied higher up the river. To what extent did that go? It appears, prior to the year 1791, the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, has a *right to all the water coming over that weir which had not been [*683 carried off by such sluice. Then, to 1791, the persons under whom the defendants claim converted the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made

both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it. By so doing they encroached on his right, and deprived him of a benefit which was attached to his estate. It was an extension of a right before exercised by them, and a material injury to the plaintiff." And Le Blanc, J., added: "The true rule is, that, after the erection of works and the appropriation by the owner of land of a certain quantity of the water flowing over it, if the proprietor of other land afterwards takes what remains, the first-mentioned owner,—however he might, before such second appropriation, have taken to himself so much more,—cannot do so afterwards." So, here, the plaintiff had a right to the use of the stream polluted only to the extent to which the immemorial user by the defendant and those under whom he claimed had polluted it; and the evidence abundantly showed that they never had the extensive right claimed upon the record.

CRESSWELL, J.(*a*)—I am of opinion that this rule must be made absolute for a new trial. I have endeavoured, but, I fear, unsuccessfully, to make myself master of what passed at the trial. My Brother Coleridge is said on the one hand to have treated the third plea as claiming an immemorial right on the part of the defendant and those under whom he claimed, to use and to foul as much of the water of the stream as
*684] might be wanted for the purpose of the tannery. That being so, *it is very singular that he should have offered the plaintiff an opportunity to amend his new assignment. He must have construed the plea as meaning to claim a user extra the purposes of the tannery. It seems to me to be impossible to suppose that he could have taken the view suggested. It is, however, pretty clear that he held the plea to be proved. Now, it is impossible to say that the plea was proved, if it be construed in the larger sense, because there was no evidence of any increase in the tannery business until within the last twenty years. He therefore could not have intended that. The defendant, as it seems to me, is in this dilemma. If the plea is to be construed in the larger sense contended for on his part, the question was not left to the jury. If, on the hand, it is to receive the more limited construction, the new assignment is aptly framed to meet it. Quâcunque viâ, therefore, the rule for a new trial must be made absolute. The real case presented upon the record has not been tried. I desire to be understood not to offer any opinion as to which is the proper construction of the plea.

WILLIAMS, J.—I am of the same opinion. The real contest between the parties seems to have been this, whether the evidence of the enjoyment of this easement was such as to warrant the jury in finding that it amounted to a right on the part of the defendant to take and foul all the water of the stream which might be required by him for the purpose

(*a*) Cockburn, C. J., was absent on account of indisposition.

of his trade of a tanner, to whatever extent. If the evidence established that extensive right in favour of the defendant, he would be entitled to general success in the cause. On the other hand, if, instead of the general right to take any quantity of the water, the defendant had the narrower right only, to take no more of the water than he and those under whom he claimed had been accustomed to take *for the use [*685 of the business as carried on within the time to which living memory reached, that limited right would not justify the defendant, and the plaintiff would be entitled to general success. It was the province of the jury to decide that. I must confess I do not perceive that the state of the pleadings presented any impediment in the way of trying that right. It is difficult to say with certainty what right it is that the pleas,—and more especially the third,—set up. If they are to be understood as claiming the larger right, then, inasmuch as it is clear that that was not admitted by the plaintiff, the case should have gone to the jury. If they had found that the plaintiff had such larger right, the defendant would have been entitled to the verdict on that as well as on the other issues. If, on the other hand, the defendant's right was only such as the plea in its narrower sense would import, the plaintiff would have failed so far as those pleas shielded the defendant, viz., to the extent of the enjoyment of the stream as it was exercised at the time when living memory first applied to the subject. Upon the whole, it seems there has been a miscarriage, and consequently the cause must go down again. Rule absolute accordingly.

*SIMIAN *v.* MILLER. *Jan.* 30. [*686

Quære, whether a plea to an action brought against a defendant in this country upon a contract made and executed in France, that the debt had been attached (saisie arrêtée), pursuant to the Code de Procédure Civile, by creditors of the plaintiff in that country, is any answer either legal or equitable?

Judgment having been signed on the ground that such a plea was not issuable, the court set aside the judgment only upon the terms of the defendant bringing the amount claimed into court.

Obtaining *leave to reply and demur*,—held to be no answer to the objection to the plea.

THIS was an action for goods bargained and sold, and goods sold and delivered, for money paid, and for money found due upon accounts stated.

The defendant, being under terms to plead issuably, pleaded the following pleas,—

First,—never indebted.

Secondly,—that, before action, he satisfied and discharged the plaintiff's claim by payment.

Thirdly,—a set-off for goods sold and delivered, money paid, &c.

Fourthly,—that, before action, he satisfied and discharged the plaintiff's claim by delivering to the plaintiff certain goods and chattels, which

the plaintiff accepted and received by way of accord and satisfaction of the said claim.

Fifthly,—as a defence on equitable grounds,(a) the defendant said, that, before and at the time of the accruing of the causes of action in the declaration mentioned, he was and still is a part-owner of a certain ship or vessel called the Caledonia, and that he never was indebted to the plaintiff otherwise than as such part-owner in manner and form as thereinafter mentioned, and the plaintiff was at the times aforesaid, and still is, an alien and a subject of the empire of France, domiciled and living and carrying on business in, and subject to the laws of, France aforesaid; and that the said goods
*687] *were bargained and sold and sold and delivered, and the said money was paid, and the said accounts were stated, and the said money became payable, under and by virtue of a contract made in France aforesaid between the plaintiff and one John Punton, then being and as the master of the said ship or vessel, for the supply of provisions and other stores by the plaintiff in and on board of the said ship or vessel, to be used and consumed by the crew and passengers of the said ship or vessel in and on board of the said ship or vessel; and under and by virtue of the said contract the goods in the declaration mentioned were accordingly supplied and delivered by the plaintiff in and on board of the said ship or vessel to and used and consumed by the said crew and passengers as aforesaid, and the said money was paid and the said accounts stated in and about the said supply and delivery thereof: that the plaintiff was before action indebted in France aforesaid to divers creditors of the plaintiff, subjects of France aforesaid, in divers sums of money amounting in the whole to more than the moneys so payable by the defendant to the plaintiff, which said creditors of the plaintiff, according to the law of France aforesaid, after the accruing of the causes of action in the declaration mentioned, and whilst the said John Punton as such master, and whilst the said ship or vessel, were in France aforesaid, caused such proceedings to be taken in the courts of law in France aforesaid having jurisdiction in that behalf, that *the said debt so accruing due to the plaintiff under and by virtue of the said contract*,—being the debt in the declaration mentioned,—*was before the commencement of this action seized, arrested, and attached, and made liable, and still is liable, to the said debts of the plaintiff; and John Punton, as such master, and the defendant, became and still are, and each of*
*688] *them is, by reason of the *said proceedings, and by the law of France aforesaid, liable to pay the said creditors of the plaintiff the said amounts of their said debts out of the moneys so payable by the said John Punton, as such master, and by the defendant to the plaintiff;*

(a) The words "as a defence on equitable grounds" were inserted upon the suggestion of Willes, J., when the parties were before him at Chambers upon a summons to plead several matters.

and the payment of the said money claimed by the plaintiff in this present action before the plaintiff should have paid, satisfied or discharged the said debts of his said creditors, or taken such proceedings in the said court of law in France that the said seizure, arrest, and attachment should be wholly ended and determined, would not according to the law of France in any way excuse or discharge the defendant from the payment to the said creditors of the plaintiff of the said amounts of their said debts, or any part thereof, but the said John Punton, as such master, and the defendant, and each of them, would, according to the law of France, be liable to pay to the said creditors the said amounts of their said debts, notwithstanding his payment to the plaintiff in the present action of the money so claimed to be payable as in the declaration mentioned: and that the plaintiff has not paid, satisfied, or discharged the said debts, or any part thereof, nor taken any proceedings to end or determine the said seizure, arrest, and attachment; but that the debts remained wholly unpaid, unsatisfied, and undischarged, and the said seizure, arrest, and attachment still remained in full force and effect according to the law of France aforesaid, and that, according to the law of France, no action could be brought by the plaintiff against the defendant in respect of the said claim of the plaintiff, during such continuance of the said seizure, arrest, and attachment as aforesaid.

The plaintiff's attorney having signed judgment, on the ground that the fifth plea was not issuable, a summons was taken out before Crowder, J., at Chambers, to *set aside that judgment for irregularity; and, that learned judge having referred the matter to the court, [*689

R. Clarke, on a former day in this term, obtained a rule nisi to the same effect. He referred to and proposed to distinguish from the present the cases of Mines Royal Societies *v.* Magnay, 10 Exch. 489,† Wodehouse *v.* Farebrother, 25 Law Journ. Q. B. 18, and Wood *v.* The Copper-Miners Company, 17 C. B. 561 (E. C. L. R. vol. 84.)(*a*)

(*a*) The affidavit upon which cause was shown set out a statement of facts, and an opinion of a French advocate as to the French law upon the subject, of which the following are copies:—

"Messrs. M'Gregor & Co., residing in Scotland, are owners of English steamers which have made on account of the French government various voyages from Marseilles to Constantinople and other ports of the Mediterranean and Black Sea. Mr. Simian, of Marseilles, was employed to furnish provisions for the passengers on board those vessels. This undertaking has not succeeded; and Mr. Simian, to escape the proceedings of his creditors, has fled to England, where he has been declared bankrupt. On the other hand, certain creditors have made attachments in the hands of the captains of the three steamers. The attachments in the hands of Captain Fraud, commanding the Empress, one of the said steamers, are in the possession of the undersigned; those intimated to the other two captains have not been handed to him; but the existence of those documents could be easily established. Under these circumstances, Mr. Simian, or the syndic of the bankruptcy declared in England, demands of the owners of these vessels the payment of the sums due from the captains.

"The question proposed to the undersigned, is, whether, according to the French law, the payment demanded can be made under the circumstances of the said attachments, and before they be removed.

"There can be no doubt on the point. The attachment is an act by which a creditor seizes

*690] *Montague Smith*, Q. C., and *H. Lloyd*, showed cause.—The judgment was properly signed, the fifth plea clearly not being an issuable plea. It sets up a supposed suspension of the plaintiff's remedy in France, which undoubtedly affords no answer at law. The rule upon this subject is well stated by Parke, B., in delivering *691] *the judgment of the Exchequer Chamber in Ford v. Beech, 11 Q. B. 852, 867 (E. C. L. R. vol. 63),—"It is a very old and well-established principle of law, that the right to bring a personal action, once existing, and by the act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in Platt v. The Sheriffs of London, Plowd. 35, 36, 'And, if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge for ever.' And in Lord North v. Butts, 2 Dyer, 139 b, 140 a, it is said: 'A thing personal suspended, or action personal suspended for an hour, is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended.' And in Woodward v. Lord Darcy, Plowd. 184, it is said: 'for, a personal action once suspended by the act or agreement of the party is always extinct, and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished.' The principle thus laid down is repeated throughout the text-books of authority, and recognised and applied

a sum due to his debtor by other parties. The effect of it is, to prevent that third party from paying, and to place the sum due from him under the hands of justice. If, notwithstanding the the attachment, the third party should pay his creditor, he would be obliged to pay a second time, from having disregarded the force of an attachment legally laid. This results from Article 557 of the Code of Civil Procedure,—'Every creditor may by virtue of titles authenticated, or privés, attach in the hands of a third party the sums and effects belonging to his debtor, or oppose their transmission.'*

"The attachments made in the hands of Captain Fraud have been made in the form prescribed by the above article. One of them, made in the name of three creditors, Mr. Simian and Messrs. Michel and Chobert, has been even declared valid [valable], by judgment of the court of Marseilles, of the 19th of April, 1856; and it has been ordered that Captain Fraud should pay into the hands of those creditors the sums he may owe, without prejudice to the rights of the other creditors who have taken similar proceedings. That judgment is added to the present note. Thus, *Captain Fraud or his owners will be obliged to pay to the creditors in France the sums due from them to Simian.* They cannot be obliged to pay a second time in England.

"The attachments in the hands of the captain evidently prevent the owners from paying: that is a consequence of Article 216 of the Code de Commerce,—'Every proprietor of a vessel is civilly answerable for the acts of the captain, and bound by the engagements contracted by the latter for whatever relates to the vessel and the voyage.'‡

"Thus, if the captain paid Simian, he would commit a wrong towards the attaching creditors, for which the owners would be responsible; and the latter would personally do the same wrong if they themselves paid.

"I therefore declare, that, according to the French law, Mr. Simian, or the syndic of his bankruptcy, cannot proceed against the owners until after removing the attachments.

"AM. ESTRANGIER, Advocate.

"Marseilles, 13 Dec. 1856."

* "Tout créancier peut, en vertu des titres authentiques, ou privés, saisir-arrêter entre les mains d'un tiers les sommes et effets appartenant à son débiteur, ou s'opposer à leur remise."

‡ "Tout propriétaire de navire est civilement responsable des faits du capitaine, pour ce qui est relatif au navire et à l'expédition."

through a long course of decision. And in Cheetham *v.* Ward, 1 Bos. & Pul. 630, 633, it is said by Lord Chief Justice Eyre 'that the principle is now acknowledged, that, where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged.' "(*a*) Then, does the plea *present any equitable defence? It has been decided over and over again, [*692 that, to make a good equitable defence, the plea must show a complete bar, and present grounds upon which a perpetual and unconditional injunction would be granted in a court of equity: Mines Royal Societies *v.* Magnay, 10 Exch. 489;† Wodehouse *v.* Farebrother, 25 Law Journ. Q. B. 18; Wood *v.* The Copper-Miners Company, 17 C. B. 561 (E. C. L. R. vol. 84). [WILLES, J.—This was put rather upon the ground that it amounted to an assignment.] It is somewhat analogous to a plea of foreign attachment, which, in Magrath *v.* Hardy, 6 Scott, 627, 4 N. C. 782 (E. C. L. R. vol. 33), was held to be no answer unless it showed that execution *had been executed.* [WILLES, J.—That turned upon the particular terms of the custom. COCKBURN, C. J.—Is it competent to the French creditor to substitute himself for Simian, and compel the defendant to pay the debt to him?] No: it is a mere stop or distringas, which may be removed in many ways, and then the plaintiff's right would revive; and this shows that the plea cannot be good either as a legal or an equitable defence. It is not like the plea in Gould *v.* Webb, 24 Law Journ. Q. B. 205. There, the defendant pleaded, as to 50*l.*, part of the plaintiff's demand, &c., that an action had been brought against the plaintiff in the Supreme Court of the state of New York, for a sum exceeding 50*l.*; that, by process duly issued out of the said court, and executed on the defendant, the said sum of 50*l.* due and owing from the defendant to the plaintiff, was attached in the defendant's hands, according to the laws of the said state, to satisfy the demand in the action; that judgment was afterwards recovered in the said court, and execution was issued to the sheriff of New York, whereupon *the defendant was obliged, by the laws of the state, to pay, and did pay,* over to the sheriff the value of the said sum of 50*l.*, deducting the necessary expenses of the *attachment. The plea [*693 further alleged that the plaintiff and the defendant were citizens of the said state, and the defendant was resident there, and subject to the jurisdiction and process of the said court; and that, by the laws of the state, the defendant was discharged and acquitted of the said sum of 50*l.* Lord Campbell said: "I think the thirteenth is a good plea. It substantially avers that the law of foreign attachment prevails at New York, and that the defendant as garnishee had by process of law been *compelled to pay* over to the sheriff of New York a debt of 50*l.* which he owed to the plaintiff. Pro tanto, I think that is a good answer to the present action."

(*a*) And see Gibbons *v.* Vouillon, 8 C. B. 483 (E. C. L. R. vol. 65).

Byles, Serjt., and *R. Clarke*, in support of the rule.—It is enough that the plea presents a fair question. It may be open to a demurrer, or it may be that the plaintiff might have applied under the 52d section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, to strike it out as an embarrassing plea. This action is brought in respect of a contract made and to be performed in France, and the interpretation of which must consequently be according to the laws of that country: and it appears that by the law of France the debt may be attached, and that such attachment has the effect of completely defeating (until removed) the remedy of the creditor. It is not like the case put, of a suspension of a cause of action by consent of the parties. An attachment under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 61, may be pleaded. [CRESSWELL, J.—Have you any authority for that? COCKBURN, C. J.—Could the creditor in this case put himself in the place of the plaintiff, and sue the debtor? *H. Lloyd.*—He could not. By the law of France, a debt may be attached by what is called an arrêt. By another proceeding, called a saisie-arrêt, the creditor may entitle himself to judgment *and execution.] *694] At all events, the plaintiff, by applying for leave to reply and demur, admits that there is something to reply to: Trott *v.* Smith, 2 Dowl. N. S. 278. [CRESSWELL, J.—In Trott *v.* Smith, an application for *time* to reply was held to be a waiver of an objection to a plea on the ground that it was not issuable. But the question here is, whether the plaintiff precludes himself from objecting that the plea is not issuable, by merely asking leave to reply and demur. We must consider whether the plea is issuable or not.]

PER CURIAM.—We think the rule may be made absolute, upon the defendant's bringing the money claimed into court to abide the order of the court on the result of a judgment on a demurrer to the plea.

Lloyd.—The defendant should abandon the other pleas.

COCKBURN, C. J.—I see no reason why the defendant should be shut out from his set-off. The rule must be made absolute, the costs to abide the event. Rule absolute accordingly.

*In the Matter of the Arbitration between EDWARD BECK and FRANCIS JACKSON. *Jan.* 28. [*695

Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, and without finally consulting, the third, cannot be supported.

By articles of agreement made the 26th of August, 1856, between Edward Beck, of Newcastle-upon-Tyne, slater, of the one part, and Francis Jackson, of the same place, agent, of the other part,—reciting that disputes and differences had arisen and were pending between the said parties thereto touching or concerning or arising out of certain goods alleged to have been sold and delivered by the said Edward Beck to the said Francis Jackson, and at his request, but which sale and delivery were disputed by the said Francis Jackson, and in order to put an end to the said differences and disputes, and to obtain an amicable adjustment thereof, the said parties thereto had respectively agreed to refer the same to the award, arbitrament, final end, and determination of John Edward Watson, of Newcastle-upon-Tyne, architect, a person chosen by or on behalf of the said Edward Beck, and John Wardle, of the same place, architect, a person chosen by or on behalf of the said Francis Jackson, *and to such third person as should be chosen and agreed upon by the said John Wardle and John Edward Watson before proceeding on the said reference, to arbitrate, adjudge, and determine jointly with them of and concerning the said matters in difference, in manner thereinafter mentioned,*—it was witnessed, that the said Beck and Jackson did for themselves severally and for their respective partners, heirs, &c., agree to stand to, obey, abide by, and perform the award, &c., of Wardle and Watson *and of such third person as should be chosen by them to arbitrate, adjudge, and determine jointly with them* *as aforesaid, *or any two of them*, of and concerning all the said matters [*696 in difference between the said parties thereto, so as the said award of the said arbitrators, or any two of them, were made in writing under their hands, ready to be delivered to the said parties in difference, &c., on or before the 14th of September next, or on or before such subsequent day or days as the said arbitrators, *or any two of them*, should at any time or from time to time, by writing under their hands, appoint for making and publishing their award in the premises, and which award of the said Wardle and Watson and such third person as aforesaid, *or any two of them*, so made as aforesaid, should be binding, final, and conclusive upon all the said parties thereto, and their respective executors, &c.: And it was thereby further agreed that the costs of the action brought by Beck against Jackson, and of preparing, engrossing, stamping, and executing that agreement, and of the said reference, and of the award to be made in pursuance thereof, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the

said arbitrators *or any two of them*, who should by their said award order and direct by whom and to whom and in what proportions and manner the same should be paid, &c. &c.: And, further, that, if either of the said parties in difference should in the opinion of the arbitrators, *or any two of them*, by non-attendance, or non-production of such books, papers, or writings as might be required for the purposes of the said reference, or in any other manner, wilfully delay or impede the said arbitrators, *or any two of them*, in proceeding with the said reference or making their said award, the said arbitrators, *or any two of them*, should be at liberty to proceed ex parte, after two days' clear notice to the party or parties causing such delay or impediment as aforesaid, &c.

*697] The two arbitrators named in the agreement duly *appointed one Dobson to be "the umpire or third party."

On the 19th of November, 1856, two of the arbitrators, viz. Dobson and Watson, made an award, the substance of which was as follows:—

"The said John Edward Watson, John Wardle, and John Dobson, having taken upon themselves the burthen of the said reference, and having on divers days and times duly heard and examined the said respective parties and their respective witnesses, and having duly inspected, weighed, and considered all and singular the books, accounts, and statements by them the said parties respectively produced and given in evidence on the said reference,—We, the said John Edward Watson and John Dobson, two of the said arbitrators, do make and publish this our award in writing of and concerning the matters so referred to us and the said John Wardle, in manner following, that is to say, we the said John Edward Watson and John Dobson, two of the said arbitrators, do find and award that there is now due and owing from the same F. Jackson to the said E. Beck the sum of 138*l.* 17*s.* 5*d.*; and we do award, order, and direct, that the dividend now payable to the creditors of Thomas Alexander of Newcastle-upon-Tyne aforesaid, builder, shall be received by the said E. Beck for and in respect of the sum of 149*l.* 2*s.* 5*d.*: And we do further award and direct that the sum of 82*l.* 5*s.* 4*d.* shall be paid by the said F. Jackson to the said E. Beck, on, &c., at, &c., and that the receipt of the said dividend and of the said sum of 82*l.* 5*s.* 4*d.* shall be accepted by the said E. Beck as and for, and the same is hereby declared by us the said J. E. Watson and J. Dobson to be, in settlement of all disputes and differences between the said E. Beck and F. Jackson, and referred to arbitration in and by the said hereinbefore recited articles of agreement as therein mentioned: And

*698] we the said J. E. Watson and J. *Dobson do further award, order, and direct that the said E. Beck and F. Jackson, shall bear and pay their own respective costs of and about the action brought by the said E. Beck against the said F. Jackson, and of preparing, &c., the agreement, and of, in, and about the reference in all other respects: And we do further award, order, and direct that the costs and charges

of the said arbitrators in and about the said reference, and the costs and charges of this award, amounting together to 72*l.* 17*s.*, shall in the first instance be borne and paid by the said E. Beck, and the said F. Jackson shall repay to the said E. Beck the sum of 36*l.* 8*s.* 6*d.*, being one moiety of the said sum of 72*l.* 17*s.*, within one week after the same shall be demanded by a notice in writing signed by the said E. Beck."

F. Russell, on a former day in this term, obtained a rule, on behalf of Mr. Jackson, calling upon Beck to show cause why the award should not be set aside, on the grounds—first, that the same was made by two of the arbitrators without notice to the third, and without dissent by him to its terms, or his withdrawal from the reference,—secondly, that the same was made by an arbitrator who had not attended all the meetings, —thirdly, that the same was made before the case was closed, and without affording Jackson an opportunity of producing his witnesses,—fourthly, that a meeting was held of which Jackson had no notice,—fifthly, that Beck and his witnesses were examined in the absence of Jackson, and without his being allowed to be present,—sixthly, that there was an excess of jurisdiction in giving any direction as to dividends. The motion was founded upon the affidavits of Jackson and of Wardle (one of the arbitrators), which clearly showed that the award had been made by Dobson and Watson without consulting Wardle or giving Jackson an opportunity to produce *evidence which he had intimated that it was his intention to offer. [*699

C. Pollock now showed cause.—With respect to the last ground of objection, it is one which might very well have been urged by Beck, if he were moving to set aside the award for uncertainty; but it hardly lies in the mouth of Jackson to object that the direction as to the mode of payment was not within the compass of so general a reference as this. [CRESSWELL, J.—Suppose Alexander objected, and Beck did not receive the 56*l.* 12*s.* 1*d.*, would Beck be concluded to that extent as against Jackson?] Clearly he would. [CRESSWELL, J.—It seems to me that the arbitrators have left it altogether uncertain whether they meant to fix Jackson with the whole amount of 138*l.* 17*s.* 5*d.*, or that he should be liable only for the balance, and that that balance and the prospect of obtaining the 56*l.* 12*s.* 1*d.* from the dividend should be taken in satisfaction of the whole. The circumstance of Beck's agreeing that the award shall be good in that respect, does not preclude the other party from contending that it is bad.] The award specifically mentions the sum which Jackson is to pay. [CROWDER, J.—How long is Jackson to be left in doubt as whether he is liable for the whole sum awarded, or for the balance only?] It is submitted he could never be called upon under this award to pay more than the 82*l.* 5*s.* 4*d.* [CROWDER, J.—I doubt that. CRESSWELL, J.—This difficulty may probably be got over by sending the matter back to the arbitrators.] All the other objections are completely answered by the affidavits of Beck, of his attorney, and

of Wardle; which show that ample opportunity was given to Jackson to produce any additional evidence he might have, that no complaint was ever made by him as to the mode in which the proceedings were being
*700] conducted, and that *the circumstance of the award having been made by Dobson and Watson only was owing to the absence of Wardle from Newcastle on the last day of the extended time for publication.

CRESSWELL, J.—I find the rule thus stated in Russell on Arbitration, p. 209,—speaking of the duty of joint arbitrators,—"As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision: Plews *v.* Middleton, 6 Q. B. 845 (E. C. L. R. vol. 5,); Little *v.* Newton, 9 Dowl. P. C. 437, 2 M. & G. 351 (E. C. L. R. vol. 40), 2 Scott, N. R. 509; Stalworth *v.* Inns, 13 M. & W. 466,† 2 D. & L. 428. So necessary is it that the arbitrators should act jointly, that, where referees in the case of a joint arbitration agreed to carry on their inquiries apart, and to examine the witnesses separately, and, if they concurred in the result, to decide accordingly, —it was laid down by the court that such a course of proceeding would not be sanctioned in any instance, but that an award made on facts so ascertained would be set aside as procured by 'undue means,' since such a mode of examination was a departure, not merely from established courses of procedure, but from natural justice: Plews *v.* Middleton. If two arbitrators meet and agree on the terms of an award, though they afterwards, when it is drawn up, fix their respective signatures to it at different times and different places, the Court of Common Pleas seem inclined to doubt whether they would hold an award void for the
*701] objection that the execution ought to have been by both *together: Little *v.* Newton. But, in a late case,—Stalworth *v.* Inns,— the Court of Exchequer were strongly of opinion that the award should have been reduced into writing by the common consent of the arbitrators, and jointly executed by them; on the principle that the law required every judicial act done by several should be completed in the presence of each other, and that, in the case of arbitrators, it was possible that at the last moment one might change his opinion. The court added a hope, that, having had this intimation from the court, arbitrators would in future take care that the execution of the award should be joint."

F. Russell.—That doctrine has since received confirmation by the Court of Queen's Bench in a case of In re Lord and Lord, 5 Ellis & B. 404 (E. C. L. R. vol. 85), where Coleridge, J., in delivering the judg-

ment of the court, says: "It is now clearly established, that every judicial act to be done by two or more, must be completed in the presence of all who do it; for, those who are to be affected by it have a right to the united judgment of all up to the very last moment. In Stalworth *v.* Inns, where it was sought to set aside an award on the ground that the two arbitrators had executed it at different times and places, the Court of Exchequer refused to do so because, if they did, there could be no appeal against their decision; but they intimated that they would grant no attachment, nor make any order for payment of the sum awarded. They left the party to bring his action, expressing a hope that, the strong opinion of the court being known, arbitrators would in future take care that their execution was joint. It appears to us that what is true of the execution of the award by arbitrators, is equally true of their appointment of an umpire: this is a judicial act of the last importance to the parties who intrust them with the absolute power *of constituting the judge who is to decide the controversy between them, about whose appointment the arbitrators may differ up to the last moment, and about which the parties have a right to the exercise of their joint judgment up to its entire completion."(*a*) [*702

CRESSWELL, J.—I think it is impossible to get over this objection. The rule to set aside the award must be made absolute.

The rest of the court concurring, Rule absolute.

(*a*) And see Peterson *v.* Ayre, 14 C. B. 665 (E. C. L. R. vol. 78).

M'Inroy *v.* Benedict, 11 Johns. 402; Short *v.* Pratt, 6 Mass. 496; Walker *v.* Melcher, 14 Mass. 149; Yates *v.* Russell, 17 Johns. 461; Ackley *v.* Finch, 7 Cowen, 290; Crofoot *v.* Allen, 2 Wendell, 494; Hoff *v.* Taylor, 2 Southard, 829; Carpenter *v.* Wood, 1 Metcalf, 409.

O'BRIEN *v.* SIR WILLIAM HENRY DON, Bart. *Jan.* 31.

The defendant was arrrested on a ca. sa. upon a judgment obtained against him in this court, and was discharged by order of a judge, on the ground that he had at the time of the arrest obtained his protection from process under a Scotch sequestration. Upon a motion to rescind that order, and for leave to issue another ca. sa.:—Held, that it was not competent to this court to inquire into the trading upon which the sequestration was founded,—although fraud was suggested.

IN the year 1850, the plaintiff obtained a judgment against the defendant in this court for 920*l.* 4*s.* The defendant shortly afterwards went to reside in the United States, and remained there until sometime in the year 1855, when he came to this country for about three weeks, and then went to Germany, where he continued to reside until the beginning of 1856. In May last he went to Edinburgh for the purpose of performing as an actor at the theatre there, where he presented a peti-

tion for sequestration to the Lord Ordinary, under the statutes 2 & 3 Vict. c. 41, and 16 & 17 Vict. c. 53, in which petition he was described as a "trader, underwriter, and dealer in stock." A sequestration was duly awarded upon that petition on the 5th of July, and a warrant of
*703] *protection granted to the defendant "against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee." A meeting of the defendant's creditors accordingly took place on the 25th of July, when a trustee was duly elected; and at that meeting the defendant made a proposal for the consideration of the creditors at the next meeting, of 4*s.* in the pound, to be paid in three, six, and twelve months; and the majority in number and value of the creditors then present at that meeting resolved that the personal protection of the defendant ought to be renewed for one year; and a renewal of his protection was accordingly granted.

On the 29th of July, the defendant was arrested by an officer of the sheriff of Lancashire, under a ca. sa. on the above judgment, purporting to be issued by the plaintiff in person, though in truth issued by a clerk of Messrs. Lewis & Lewis. The sheriff declining to discharge the defendant out of custody, upon the production of the proceedings in the sequestration and the warrant of protection, a summons was taken out calling upon the plaintiff to show cause why the defendant should not be discharged, which summons was duly served at the office of Messrs. Lewis & Lewis, as the plaintiff's attorneys; and on the 31st Crowder, J., "upon hearing counsel for the defendant, and the attorneys or agents for the sheriff of Lancashire, and upon reading the several affidavits of the defendant and J. H. Wilton," ordered that the defendant be discharged immediately from custody, "with costs to be paid by the sheriff, unless the sheriff should satisfactorily answer the affidavit of J. H. Wilton in a week after having a copy thereof." On the 22d of August, a summons was obtained to rescind that order: this summons came on for hearing before Bramwell, B., on the 29th, and was by him referred to the court.

*704] **Shee*, Serjt., in Michaelmas Term last, instructed by Messrs. Lewis & Lewis as attorneys for the plaintiff, obtained a rule calling upon the defendant to show cause why the order of Crowder, J., should not be set aside, and why the plaintiff should not be at liberty to issue a new writ of ca. sa. against the defendant. The affidavits upon which the rule was obtained were those of the plaintiff and of Mr. J. G. Lewis. The former pledged his belief that the sequestration was founded on a fraudulently alleged trading, and was obtained for the purpose of protecting the defendant from arrest at his suit, and not with the intention of bonâ fide carrying out the objects thereof; that he (the plaintiff) had been acquainted with the defendant for many years, and that during the whole of such period the defendant never was a trader; and that the debts proved under the sequestration were

none of them trade debts, but were all debts due to private personal friends of the defendant. Mr. Lewis's affidavit stated, that, on the summons to discharge the defendant from custody being served at his office, it was returned to the defendant's attorneys with an intimation, that, as the ca. sa. was sued out by the plaintiff in person, he could not appear to the summons; and that his partner and himself had been instructed by the plaintiff to appear as his attorneys upon this application since the 31st of July.

Montague Smith, Q. C., now showed cause.(*a*)—The defendant was clearly entitled to be discharged from custody upon the production of the warrant of protection: Jones *v.* Anstruther, 1 Exch. 867.† The 18th section of the 2 & 3 Vict. c. 41, enacts "that the warrant granting *protection or liberation, or a copy thereof certified by one of the bill chamber clerks, shall protect or liberate the debtor from [*705 arrest or imprisonment in Great Britain and Ireland and Her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in meditatione fugæ, or ad factum præstandum, or for any criminal act." The affidavits upon which this rule was obtained disclose no ground upon which this court can inquire into the validity of the protection granted to the defendant. [WILLIAMS, J.—Suppose an application were made to discharge a party from arrest here, on the ground that he had obtained a certificate in the Court of Bankruptcy, would it be any answer to say that the defendant was not a trader?] Clearly not. This court cannot upon a motion of this sort try the validity of the proceedings under the sequestration. If any imposition has been practised upon the Scotch court, the remedy must be sought there.

Shee, Serjt., in support of the rule.—The grounds of this motion are, that the order for the defendant's discharge from custody was obtained upon an ex parte application, and without notice to the plaintiff; and that the sequestration, and the consequent protection, were fraudulently obtained, the defendant having by his petition falsely represented himself to be "a trader, underwriter, and holder of railway and other stock, and as such within the description of persons whose estates might be sequestered, as contained in the 2 & 3 Vict. c. 41," when in point of fact he was not and never had been a trader at all. First,—as to the want of notice. Messrs. Lewis & Lewis not being the plaintiff's attorneys at that time, the summons should have been served upon the plaintiff himself. [*Smith.*—The affidavits show *numerous com- [*706 munications with Messrs. Lewis & Lewis, in which they were assumed to be, and were treated as, the plaintiff's attorneys. CRESS-

(*a*) It appeared by the affidavits that the plaintiff had been outlawed, at the suit of one Ford, on the 24th of May, 1849, and that the outlawry was not *formally* reversed until the 15th of October last.

WELL, J.—Is there not an objection a little higher up? Can an outlaw issue a writ in person?] Substantially the outlawry was long since gone, though the formal entry of reversal appears not to have been made until the 15th of last October. [One of the Messrs. Lewis, who was in court, admitted that the ca. sa. was issued by his clerk with his sanction, he having an interest in the judgment.] The main point arises from the sequestration. Although the courts of this country give full faith and credence to the judgment or adjudication of a foreign court of competent jurisdiction; yet, if it is shown that such judgment or adjudication has been fraudulently obtained for the purpose of defeating or evading the process of our courts, the party will not be allowed to avail himself of it. The validity of a foreign judgment may always be inquired into, where fraud is suggested: The Bank of Australasia v. Harding, 9. C. B. 661 (E. C. L. R. vol. 67). [CRESSWELL, J.—That is where you are seeking to enforce it here.] The affidavits upon which this rule was obtained distinctly allege that the defendant was not a trader, and that his assumption of trading was a mere sham; and he makes no affidavit in answer. [CRESSWELL, J.—How can we inquire into that here? In the case of Barrow v. Poile, 1 B. & Ad. 629, the after-acquired goods of a certificated bankrupt having been taken in execution for a debt which might have been proved under the commission, the court, on motion, set aside the fi. fa., and refused to put the bankrupt to an auditâ querelâ, though it was stated on behalf of the creditor that the bankruptcy was collusive, and that, in an action by the assignees, a jury had found against the plaintiffs as to the fact of the trading. Lord Tenterden, in giving judgment, there says,—"It is expressly enacted by the 121st section of the *707] statute [6 G. 4, c. 16], that *every bankrupt who shall have surrendered and conformed himself, and obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from all demands provable under the commission. This judgment-debt was clearly so provable. It is admitted, that, if an action had been brought on this judgment, the defendant might have pleaded his bankruptcy and given the certificate in evidence, and that the certificate would have been conclusive; and also, that, if he had been taken in execution upon the judgment, or detained in prison upon it, he might have been discharged by a judge on production of his certificate, in which case also it would have been conclusive. But it is said the certificate is conclusive in these cases only. Whether the language of the 126th section is sufficiently general to include the present case or not, does not seem to me to be very material; it points out the course of proceeding in particular instances, but it cannot control the general words of the 121st section; and, it being manifest that the plaintiff's demand is one which might have been proved under the commission, I think we should not give effect to the words of that section, which provides that the bankrupt obtaining his certificate shall be discharged from every

demand provable under the commission, if we were to reject the present application, and put the defendant to the course which has been suggested. If the certificate could be brought within any of the cases specified in the 130th section, where it is declared that a certificate, if obtained, shall be void, as, by gaming or other misconduct of the bankrupt, the question would be very different: but nothing of this kind is suggested: the only endeavour here is, to throw a doubt upon the trading and petitioning creditor's debt."(*a*)] *It must be confessed that there would be great difficulty in distinguishing that case from the present. [*708

COCKBURN, C. J.—I am of opinon that this rule must be discharged. The case of Barrow *v.* Poile is directly in point. The protection granted under the Scotch Sequestration Act, 2 & 3 Vict. c. 41, s. 18, is quite analogous to the certificate under the 205th section of our Bankrupt Act, 12 & 13 Vict. c. 106. It is clearly established, that, where a bankrupt has obtained his certificate, the petitioning creditor's debt, the trading, or the act of bankruptcy, cannot be called in question in a proceeding like this. The principle is the same as applied to the warrant of protection granted under a Scotch sequestration.

CRESSWELL, J.—I am entirely of the same opinion. With respect to the notice, I think Messrs. Lewis were the proper persons to receive notice of the summons for the defendant's discharge from custody. Although they might not strictly speaking be his attorneys, they clearly were his agents for that purpose.

The rest of the court concurring, Rule discharged, with costs.

(*a*) And see Pennell *v.* Butler, 18 C. B. 209 (E. C. L. R. vol. 86). By the 20th section of the 17 & 18 Vict. c. 119, it is enacted that a trader petitioning for an adjudication of bankruptcy shall forthwith after filing his petition, and before adjudication, make it appear to the satisfaction of the court that *his available estate is sufficient to produce* 150*l. at the least*:—Held, that the decision of the Court of Bankruptcy as to value is conclusive.

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*CUMBERLEGE and Another *v.* HENRY LAWSON. *Jan.* 23. [*709

To a declaration upon an indenture, described as made between R. G. of the first part, the defendant and one T. L. of the second part, and the plaintiffs of the third part, whereby the defendant and T. L. jointly and severally covenanted with the plaintiffs for the payment by R. G. of certain annual premiums,—the defendant (setting out the indenture in hæc verba, showing that it was made between R. G. of the first part, the defendant and T. L. *and one Pearce* of the second part, and the plaintiffs of the third part) pleaded "that the said indenture was made and executed by him, *in the faith* that Pearce should join therein or execute the same, and that Pearce never did join therein or execute the same:"—Held, bad, it not appearing that the defendant's execution of the deed was *upon condition* that his execution thereof should be void, if the deed was not executed by Pearce, the other co-surety.

The plaintiffs replied, "on equitable grounds," that, after the making and executing of the indenture in the plea mentioned by the defendant and R. G. and T. L., and before the time for payment of the instalments had arrived, R. G., the defendant, and T. L., having notice that Pearce had not joined in nor executed the indenture, by a note in writing consented and agreed that they would be liable upon the indenture, and that their execution thereof should be valid and binding upon them although Pearce had not executed it; and that the plaintiffs relied and acted upon such consent and agreement:—*Quære*, whether the replication showed any equitable answer to the plea, if well pleaded?

THE declaration stated, that, on the 7th of February, 1844, by a certain indenture made between one Robert Goodwin of the first part, and the defendant and one Thomas Lawson of the second part, and the plaintiff's and Sir G. W. Prescott, Bart., since deceased, of the third part,—after reciting that the said Robert Goodwin had effected a policy of assurance on his own life in the Anchor Life Assurance Company, whereby the funds and other property of the said company were charged with and rendered subject and liable to the payment to the executors, administrators, or assigns of the said Robert Goodwin, of the sum of 600*l.*, within three months after satisfactory proof of his decease, subject to the payment of the annual premium and to the provisions in the said policy expressed; and reciting that the said Robert Goodwin had agreed with the plaintiffs and the said Sir G. W. Prescott for the loan of 85*l.*, on the security of an assignment of the said policy, and the *joint and several* covenants of the said Robert Goodwin and the defendant and the said Thomas Lawson,—it was witnessed, that, in consideration of the *710] sum of 85*l.* paid to *the said Robert Goodwin by the plaintiffs and the said Sir G. W. Prescott, he the said Robert Goodwin did thereby assign unto the plaintiffs and the said Sir G. W. Prescott the said recited policy, and the moneys thereby assured, and all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, moneys, and premises unto the plaintiffs, subject to the proviso thereinafter contained, that is to say, provided always, that, in case the said Robert Goodwin, his heirs, executors, or administrators, should pay to the plaintiffs and the said Sir G. W. Prescott, their executors, administrators, or assigns, the said principal sum of 85*l.*, by equal quarterly payments of 7*l.* 10*s.* on each succeeding 7th of May, 7th of August, 7th of November, and 7th of February, until the whole of the said principal sum should be paid, together with interest at 5*l.* per cent. per annum on so much of the said principal sum as should from time to time remain unpaid,—the first of such instalments to be paid on the 7th of May then next,—then and in that case, and the covenants thereinafter contained being fully performed, the said indenture and the assignment thereby made should be null and void; and the defendant did thereby covenant with the plaintiffs and the said Sir G. W. Prescott, that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of them, or their or some or one of their executors or administrators, would pay to the plaintiffs and the said Sir G. W. Prescott, their executors, administrators, or assigns, the said instalments and interest on the several days and times aforesaid, and that, if default should be made in payment of any or either of the said instalments and interest, or any part thereof as aforesaid, then that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of them, their

or some or one of their executors or administrators, would *pay to the plaintiffs and the said Sir G. W. Prescott, their executors, [*711 administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as should remain unpaid; and did further covenant that they the said Robert Goodwin and the defendant and the said Thomas Lawson, or some or one of them, their or some or one of their executors or administrators, would, from time to time during the life of the said Robert Goodwin, until all moneys secured by the said indenture should be fully paid and satisfied, pay the premiums, duty, and expenses which ought to be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy: That the said Robert Goodwin and the defendant and the said Thomas Lawson had not, nor had any or either of them, paid the said sum of 85*l.*, or any part thereof, or any interest on the same, or any part thereof, and the whole of the said principal sum, and all such interest as aforesaid respectively remained and were wholly due and unpaid, contrary to the covenant of the defendant in that behalf: That, although all the moneys secured by the said indenture had not been fully paid and satisfied, and although in the lifetime of the said Robert Goodwin a certain premium, to wit, the sum of 14*l.* 12*s.*, was forgotten and ought to have been paid for keeping the said policy on foot, the said Robert Goodwin and the defendant and the said Thomas Lawson did not, nor did any of them, pay the said premium, or any part thereof, but default was made in the payment thereof, contrary to the said covenant of the defendant in that behalf; And that, by reason of the premises, the plaintiffs and the said Sir G. W. Prescott were entitled to receive the amount of the said last-mentioned premium, but the said Robert Goodwin and the defendant and the said Thomas Lawson had not nor had either of them paid the same, or any part thereof, but the same remained and was wholly due *and unpaid, contrary to the [*712 defendant's covenant in that behalf: And the plaintiff claimed 200*l.*

Second plea, that the indenture in the declaration mentioned was and is in the words and figures following.—"This indenture, made the seventh day of February, 1844, between Robert Goodwin, of, &c. (who is hereinafter for the sake of brevity styled 'the said borrower'), of the first part, Henry Lawson, of, &c., Thomas Lawson, of, &c., and Joseph Pearce, of, &c. (sureties of the borrower), of, the second part, and Nathaniel Cumberlege, of, &c., Sir G. W. Prescott, of, &c., and Edward Baylis, of, &c., of the third part: Whereas, by a policy of assurance of the Anchor Life-Assurance Company, dated the 6th of July, 1843, and numbered 275, the funds and other property of the said company are charged with and rendered subject and liable to the payment to the executors, administrators, or assigns of the said borrower of 600*l.* within three months after satisfactory proof of his decease, subject to the pay-

ment of the annual premium and to the provisions in the said policy expressed: And whereas the said borrower hath agreed with the said parties hereto of the third part, for the loan of 85*l.* on the security of an assignment of the said policy, and joint and several covenants of the said borrowers and of the parties hereto of the second part hereinafter contained: Now this indenture witnesseth, that, in consideration of the sum of 85*l.* to the said borrower paid by the said parties hereto of the third part immediately before the execution of these presents, the receipt whereof the said borrower doth hereby acknowledge, the said borrower doth by these presents, grant, bargain, sell, assign, and transfer unto the said parties hereto of the third part, their executors, administrators, and assigns, all that the said recited policy, and the money thereby assured, and all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, moneys,

*713] *and premises, unto the said parties hereto of the third part, their executors, administrators, and assigns, subject nevertheless to the proviso hereinafter contained: And the said borrower doth hereby irrevocably constitute and appoint the said parties hereto of the third part, their executors, administrators, and assigns, to be the attorneys and attorney of the said borrower, his executors and administrators, and at his or their costs and charges to ask, demand, sue for, recover, retain, and receive of and from the said company, and all other persons who may pay the same, all and every sum and sums of money which shall become payable by virtue of the said policy, and to give sufficient receipts and discharges for the same, and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever relative to the premises, as fully to all intents and purposes as the said borrower, his executors or administrators, might or could do in his or their own proper person or persons; and whatsoever the said attorneys or attorney shall lawfully do or cause to be done in or about the premises the said borrower doth hereby, for himself, his heirs, executors, and administrators, covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that he the said borrower, his executors or administrators, will allow and confirm: And the said borrower doth declare that the person or persons, company or companies, paying to the said attorneys or attorney any sum or sums of money on account of the said policy, shall be exempt from all liability of seeing to the application thereof, and shall not be concerned to inquire or take notice whether default has been made in payment of the moneys and interest hereby secured, or whether the said moneys or interest, or any part thereof, still remain due or unpaid: Provided always, that, in case the said borrower, his heirs, executors, or administrators, shall pay unto the

*714] said parties hereto of the third part, their *executors, administrators, or assigns, the said principal sum of 85*l.* by equal quarterly instalments of 7*l.* 10*s.* each, on each succeeding 7th of May, 7th

of August, 7th of November, and 7th of February, until the whole of the said principal sum shall be paid, together with interest at five per cent. per annum on so much of the said principal sum as shall from time to time remain unpaid,—the first of such instalments to be paid on the 7th of May next,—then and in that case (and the covenants hereinafter contained being fully performed) these presents, and the assignment hereby made, shall be null and void: And the said borrower and the said parties hereto of the second part, do hereby, for themselves, their heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said instalments and interest on the several days and times aforesaid; and that, if default shall be made in payment of any or either of the said instalments and interest, or any part thereof, as aforesaid, then that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as shall remain unpaid; and do further covenant, in manner aforesaid, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will from time to time during the life of the said borrower, until all moneys secured by these presents shall be fully *paid and satisfied, pay the premiums, duty, and expenses which ought to [*715 be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy; and that, in case default shall be made in payment of any such annual premiums, duty, or expenses, it shall be lawful for the said parties hereto of the third part, their executors, administrators, and assigns, from time to time, so long as any money shall remain secured by these presents, to keep on foot such assurance as aforesaid, and, in case of the forfeiture or determination of the said policy, to renew the same policy, or effect a substituted policy with the said company for the like amount upon the life of the said borrower, and to pay or retain the premiums and other expenses thereon; and that the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators, will, upon request, pay unto the said parties hereto of the third part, their executors, administrators, or assigns, all such money as they or he shall expend in or about, or be reasonably entitled to receive or retain for or in respect of keeping on foot such assurance as aforesaid, or for or in respect of renewing the same policy or effecting any such substituted policy as aforesaid, with interest thereon after the rate of 5*l.*

for every 100*l.* by the year; and the said policy or such substituted policy shall be a security for the repayment of the same sums and interest in addition to the said sum of money hereby secured as aforesaid, and the interest thereof, and the costs, charges, and expenses occasioned by the non-payment thereof; but so, nevertheless, that the total amount of principal money to be ultimately recoverable under these presents shall not exceed the sum of 200*l.*; and also that the said borrower will not do any act, or commit any default whatsoever, by means of which the said recited policy, or any substituted policy, shall be impeached or
*716] become *void or voidable, or by reason whereof any higher rate of premium may become payable thereon: and further, that, in case the said borrower shall happen to go to reside beyond the seas, or become bankrupt or insolvent, or be unable to meet his engagements with his creditors, or in case each or either of them the said parties hereto of the second part, or any other surety to be substituted as hereinafter mentioned, shall happen to die, or go to reside beyond the seas, or become bankrupt or insolvent, or unable to meet his engagements with his creditors, before the whole of the moneys and interest intended to be hereby secured shall be paid, then, if the said borrower shall not at his own costs, within twenty-eight days next after the happening of either of the said events, from time to time as often as the case shall happen, procure some responsible person, to be approved of by the said parties hereto of the third part, their executors, administrators, or assigns, as a substitute for each such person as shall so die, go to reside beyond the seas, become bankrupt or insolvent, or unable to meet his engagements with his creditors as aforesaid, to enter into a bond in a sufficient penalty, or deed of covenant, at the option of the said parties hereto of the third part, their executors, administrators, or assigns, for securing the payment to them of the said principal sum hereby secured, and the interest thereof, or so much thereof as shall remain unpaid, and also the payment of such premiums, duty, and expenses as aforesaid, with interest, in manner hereinafter mentioned, so that the said principal money, premiums, and interest respectively may always be secured by bond or covenant to the satisfaction of the said parties hereto of the third part, their executors, administrators, or assigns; or if the said parties hereto of the first and second parts, their executors or administrators, or any surety or sureties to be substituted as aforesaid, or any
*717] or either of them, shall not at all *times, so long as any money shall remain due on this security, duly pay all the premiums, duty, and other expenses for keeping on foot the aforesaid policy, or any substituted policy for the time being in force, as and when the same ought to be paid; or if the said borrower shall do any act, or commit any default, by means of which any such policy shall become liable to be impeached or void or voidable, or any additional rate of premium become payable thereon; then that they the said parties hereto of the

first and second parts, or some or one of them, their or some or one of their executors or administrators, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as shall remain unpaid. In witness, &c."

Averment, that the said indenture was made and executed by him the defendant in the faith that the said Joseph Pearce should join therein and execute the same, and that the said Joseph Pearce never did join therein or execute the same.

To this plea the plaintiff replied, on equitable grounds, that, after the making and executing of the said indenture in the plea mentioned, by the defendant and the said Robert Goodwin and Thomas Lawson, and before the time for payment of any of the said instalments or sums of money pursuant to the said indenture had arrived, the said Robert Goodwin and the defendant and the said Thomas Lawson, having notice that the said Joseph Pearce had not joined in nor executed the said indenture, did, by a certain note in writing signed by them respectively, consent and agree with the plaintiffs, that they the said Robert Goodwin and the defendant, and the said Thomas Lawson, would be liable upon the said indenture, and that their execution thereof should stand good and be valid and binding upon them, *although the said Joseph Pearce had not executed the said indenture; and the plaintiffs, [*718 relying upon the said consent and agreement, did give time for payment of the said sum of 85*l.* according to the form and effect of the said indenture.

The plaintiffs also demurred to the second plea, the point marked in the margin being,—"One of the matters of law intended to be argued on this demurrer, is, that it does not appear that the defendant's execution of the indenture was upon condition that his execution of the said indenture should be void if the deed was not executed by the said Joseph Pearce, nor does it appear that the defendant would not have executed the same if he had known that the said Joseph Pearce would not join in the execution thereof." Joinder.

The defendant demurred to the replication, the ground stated in the margin being,—"One of the points of law intended to be argued, is, that the replication discloses no consideration for the agreement, and that such an agreement would not make the deed valid." Joinder.

Hindmarch, for the plaintiff.—The plea is bad. The averment is, that the defendant *made and executed the deed* (which imports delivery) in the faith that Pearce should join therein and execute the same,—that is, with an expectation in his own mind that Pearce would execute it afterwards. It cannot be put higher than an execution and delivery of a deed as an escrow. [CRESSWELL, J.—A deed cannot be delivered as an escrow to the party himself.] Clearly not. The doctrine on this subject will be found in Co. Litt. 36 a,—"If a man deliver a

writting sealed to the party to whom it is made, as an escrow, to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the party himself; for, the delivery is sufficient, without speaking of any words (otherwise, a man that is mute *719] *could not deliver a deed), and tradition is only requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect, non quod dictum est, sed quod factum est inspicitur. And hereof though there hath been variety of opinions, yet is the law now settled agreeable to judgments in former times; and so it was resolved by the whole Court of Common Pleas. But it may be delivered to a stranger as an escrow, &c., because the bare act of delivery to him without words worketh nothing." So, in Sheppard's Touchstone, 58, it is said: "The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two conditions must be heeded,—1. that the form of words used in the delivery of a deed in this manner be apt and proper,—2. *that the deed be delivered to one that is a stranger to it*, and not to the party himself to whom it is made. The words, therefore, that are used in the delivery must be after this manner: 'I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is.' Or else it must be thus,—'I deliver this as an escrow to you, to keep until such a day, &c., upon condition, that, if before that day he to whom the escrow is made shall pay me 10*l.*, or give to me a horse, or infeoff me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed.' For, if when I shall deliver the deed to the stranger, I shall use these or the like words,—'I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions;' or, 'I deliver this to you as my deed, *720] to *deliver to him to whom it is made when he comes to London:' in these cases, the deed doth take effect presently, and the party is not bound to perform any of the conditions. So, it must be delivered to a stranger; for, if I seal my deed and deliver it to the party himself to whom it is made, as an escrow, upon certain conditions, &c., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions: for, 'in traditionibus chartarum, non quod dictum, sed quod factum est inspicitur.'" So, in Thoroughgood's Case, 9 Co. Rep. 137, "it was resolved that the actual delivery of a writing sealed to the party, without any words, is a good delivery; for, in traditionibus scriptorum, non quod dictum est,

sed quod gestum est inspicitur: but here he saith, 'I deliver this writing to you,' which clearly is sufficient, although he doth not say, as his deed, or as his act. And therefore, if A. makes a writing to B., and seals it, and delivers it to B. as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed, for, the law respects the delivery to the party himself, and rejects the words which will make the express delivery to the party upon the matter no delivery." For the purpose of this issue, the execution of the deed is admitted. Horne *v.* Ramsdale, 9 M. & W. 329, is also a distinct authority to show that the plea affords no answer to the covenant which the defendant has entered into. There, to a declaration stating that T. was the lessee of certain tolls, and that S. and the defendant agreed to join with T. in a bond conditioned for payment of the rent under the lease, and alleging as a breach that the defendant refused to join T. in the bond,—the defendant pleaded, first, that, at the time of tendering the bond to him, S. had not executed the same, nor was he present ready to execute it jointly *with the [*721 defendant, secondly, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it: and it was held that the pleas were bad. "What the defendant undertook," said Alderson, B., "was, to join with Taylor in the bond. The only condition precedent was, the execution of the bond by Taylor. He has executed it, but the defendant refuses to do so. I think he has no right so to refuse: it is no part of the agreement that he shall join with the other surety in the execution." So, here, the execution of the deed by Pearce, the co-surety, was not a condition precedent to the covenantee's right to put the deed in suit against the defendant. Then, as to the replication,—although it professes in its commencement to be an answer to the plea upon equitable grounds, that will not prevent its enuring as a *legal* answer, if it may do so. By the 85th section of the Common Law Procedure Act, 1854, a plea or replication is to have no effect as a plea or a replication on equitable grounds, unless it is stated to be so pleaded: but the statute contains nothing to prevent or destroy its operation as a legal answer. [CRESSWELL, J.—It may be so: but the result will be, that every plea or replication will commence with the words "on equitable grounds."] The replication shows good reason why the defendant should upon equitable grounds be precluded from setting up the defence alleged in the plea: it states that Goodwin, the defendant, and Thomas Lawson, had notice of the non-execution of the deed by Pearce, and by note in writing consented and agreed to be liable thereon notwithstanding such non-execution by Pearce; and that the plaintiffs, relying upon such consent and agreement, gave time for the payment of the money: and that is admitted by the demurrer. It

is submitted, therefore, that the replication is a good answer either at law or in equity.

*722] *G. B. O. Harrison*, contrà.—The defendant is sought to be charged in this action as surety for Goodwin. If Pearce had executed the deed, the defendant would have had a right to resort to him for contribution, as well as to Thomas Lawson: his position, therefore, is materially varied by its non-execution by Pearce. In construing the deed, it is important not to lose sight of what was passing in the defendant's mind when he executed it. [CRESSWELL, J.—What was passing *in his mind* at the time cannot affect the construction of the deed.] It may fairly be inferred that he only executed the deed upon the supposition that Pearce also would execute it. [CRESSWELL, J.—What do you say to the passage cited from Sheppard's Touchstone?] That still, it is submitted, leaves it a question of fact for the jury whether the delivery was a valid and complete delivery,—a delivery to *the party* not being admitted by the plea. In another part of the same book,—p. 83,—it is said that a deed "shall enure as much as may be according to the apparent intent of the parties; and therefore it is, that, if a feoffment be made of a manor with an advowson appendant, or a bargain and sale of land in possession and land in reversion together be made, and the feoffment is not well executed for want of livery of seisin or attornment, or the deed of bargain and sale is not enrolled; in these cases, albeit the advowson may pass without livery or attornment, and the reversion without enrolment, yet, because the intent doth appear to be that all shall pass together, therefore neither the advowson nor the reversion will pass by this deed." Here, the intent was that all three of the sureties should be bound. In Seaton *v.* Henson, 2 Lev. 220, it was held, that, if three be jointly and severally bound, and the seal of one be torn off, the obligation is void in facto. [CRESSWELL, J.—That would be the same as if a release were executed to that party: it would be a subsequent alteration of the instrument in

*723] a *material part.] So, here, something has been omitted to be done, the effect of which is to vary the liability of the defendant. In Pym *v.* Campbell, 6 Ellis & B. 370 (E. C. L. R. vol. 88), parol evidence was held admissible to show that a memorandum, though signed by the defendant, was not intended to enure as an agreement unless approved by a third person, and that such third person did not approve. [CRESSWELL, J.—The argument on the other side is, that, the execution and delivery of the deed *to the party* being admitted, the defendant is without defence unless he shows that the thing delivered never was a deed. The question is, whether the plea shows a legal answer to the declaration.] In Murray *v.* The Earl of Stair, 2 B. & C. 82 (E. C. L. R. vol. 9), 2 D. & R. 278 (E. C. L. R. vol. 16), a subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should

remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: and the court held that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of the delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B. and until the securities were delivered up. In Davis *v.* Jones, 17 C. B. 625, 634 (E. C. L. R. vol. 84), Jervis, C. J., said: "A written instrument does not necessarily operate from delivery; it is competent to a party to show that it was delivered as an escrow, and that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event. That was expressly decided in Murray *v.* Earl of Stair." And, after stating the circumstances of that case, his Lordship added: "It was perfectly competent to the plaintiff, the agreement being silent on the subject,—to *show by parol testimony that it was not intended to take effect until the happening of something else." [CRESSWELL, [*724 J.—There is no question here as to the construction of the deed: the only question is whether the defendant is bound by it. If the defendant had pleaded, that, though he sealed and delivered the deed, he delivered it with intent that it should not take effect as his deed until the third surety (Pearce) had executed it, Mr. *Hindmarch* would probably not have argued as he has. It may be that it is open to the defendant to contend that the deed was delivered by the defendant as an escrow until its execution by Pearce, upon non est factum.] In Latch *v.* Wedlake, 11 Ad. & E. 959 (E. C. L. R. vol. 39), in assumpsit on a contract for the delivery of coals from a colliery, it appeared that the agreement (for supplying such coals, and for the demise of a coal-wharf) purported to be made between the plaintiff and the partners in the colliery, three in number, and was executed by the plaintiff and two of the partners; and it was held, that, admitting such contract to be one by which partners might bind an absent copartner or themselves, yet the judge, on the trial, ought not to decide, as matter of law, that the contract signed by two bound them, but should desire the jury to say whether it was intended to do so or not, if there were circumstances from which an intention could be inferred that no party should be bound unless all the partners signed: as, the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it; and the manner in which previous contracts between them of the same kind had been executed. In giving judgment, Lord Denman there said: "Wherever an instrument is to be executed by several parties, there must be some interval between the execution of each, and, if all be not present at the same time, the interval may be considerable; and it can-

*725] not be contended that *the mere fact of execution conclusively binds him, when that has been done on the faith that all will execute, and any one shall refuse." That case was evidently in the mind of the pleader when he drew this plea. [CRESSWELL, J.—There was evidence there that the partners who signed the contract had applied to the copartner, and that he refused to sign: the only question was, whether the judge was right in assuming that they signed for themselves, and that they were bound.] Evans v. Bremridge, 25 Law Journ. Ch. 102, 334, shows, that, under circumstances like these, the defendant would be discharged in equity. [CRESSWELL, J.—This plea is not pleaded as an equitable defence. CROWDER, J.—It would be proved by calling the party himself, and by his stating that he executed the deed upon the *faith* that Pearce would also execute. That clearly would be no answer.] It is submitted that it is to be implied from the whole plea that the execution by the defendant was *conditional.* [CRESSWELL, J.—I think not.] Then the replication is bad: it sets up a parol agreement, which can be no answer to an action on the deed: Davey v. Prendergrass, 5 B. & Ald. 187 (E. C. L. R. vol. 7). To make the replication good, the plaintiff must establish that he has a right to full relief in a court of equity. And it is a principle in equity, that, if there is a valid legal instrument in existence, no relief can be given until the instrument has been reformed: Wood v. Dwarris, 11 Exch. 493;† Jacobs v. Richards, 18 Beavan, 300. If the plea is a good bar, a court of equity would not interfere: Hunter v. Gibbons, 1 Hurlst. & N. 459.†

Hindmarch, in reply, was stopped by the court.

CRESSWELL, J.—I am of opinion that the second plea is bad. The declaration is founded upon a deed which is set out upon the record, and

*726] confessed to have been *made between Robert Goodwin of the first part, Henry Lawson (the defendant), Thomas Lawson, and Joseph Pearce of the second part, and the plaintiffs (Cumberlege and Baylis) and one Prescott of the third part,—the parties of the second part being sureties, and two of them only (viz. Robert Goodwin and the defendant) having executed it. By the deed, the parties of the second part jointly and severally covenanted for the due payment by Goodwin of certain annual premiums. The defendant by his plea does not say that he did not seal and deliver the deed, or that he executed it only on condition that he should not be bound by it unless it were executed by both his co-sureties, or that he was betrayed into executing it; but simply that the deed was made and executed by him *in the faith* that Pearce should join therein and execute the same, and that Pearce never did join therein or execute the same. I see nothing to lead the court to the conclusion that the defendant did not intend to bind himself by executing the deed. If he meant to insist that he delivered it upon condition that it should only be operative as a deed upon its being ex-

ecuted by Pearce, he should have so pleaded. It is not necessary to determine whether the matter stated in the replication would have been any answer either at law or in equity; though in Murray *v.* The Earl of Stair such matter was allowed to be given in evidence under non est factum.

CROWDER, J.—I am of the same opinion. When the declaration states that the indenture was sealed and delivered by the defendant, in order to defeat that, the defendant must show either that he delivered it as an escrow, or that there has been fraud. But here the plea merely alleges something that was passing in his own mind,—that he executed the deed *on the faith* that it would be executed by the third surety. That clearly is no answer.

**Harrison* prayed to be allowed to amend his plea, by stating [*727 that the deed was executed by the defendant on the express condition that Pearce should also execute it, and that the condition was not performed,—pleading it as an equitable defence.

CRESSWELL, J.—I think that would not make a good plea. But, if the defendant wishes to be allowed to plead an equitable plea, he must go to chambers and ask leave to add a plea.

Judgment for the plaintiffs.

PATRICK and Another *v.* REYNOLDS. *Jan.* 31.

A company was projected for the filtration and supply of water. Whilst the bill for its formation was before a committee of the House of Commons, the engineer (upon the suggestion of counsel) employed a builder to erect a cistern for the purpose of testing the process of filtration (for which the engineer had obtained a patent). The defendant was a member of the provisional committee, and the cistern was with his assent erected on land in his occupation:—Held, no evidence to warrant a jury in inferring that the order for the work was given by the defendant's authority, or that the work was done upon his credit.

THIS was an action for work and materials done and provided by the plaintiffs for the defendant, at his request, and for money due on accounts stated. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in London after last Trinity Term, when the case made on the part of the plaintiffs was as follows:—In the year 1850, a patent was taken out by one Thompson for filtering water; and Thompson, in conjunction with one Mullens, an attorney, attempted to form a company, to be incorporated by act of parliament, and to be called "The Wandle Water and Sewerage Company," for the purpose of working the patent, and supplying the southern parts of London with water. The defendant was a member of the provisional committee of the proposed company. Thompson was the engineer. Whilst the *bill for the formation of the company [*728 was before a committee of the House of Commons, a model of Thompson's invention being produced, it was suggested by the petitioners' counsel that it would be advisable to have a cistern erected upon a

large scale, in order to show practically the quantity of water that could be purified by the new process in a given time. Thompson accordingly applied to the plaintiffs, who are builders, to do the necessary work; and the spot fixed upon was, with the defendant's assent, some land in the defendant's occupation adjoining the river Wandle. The order for the work was given by Thompson and Mullens; and it was entered in the plaintiffs' books as having been done for "The Wandle Water Company." The work was done in 1852. In August, 1854, a bill was delivered at the offices of the company, headed "The Wandle Water Company, Drs. to M. & T. Patrick:" and this action was commenced against the defendant early in 1855. There was no evidence that the defendant had at all interfered with the work, except that he was occasionally present on the ground with Thompson whilst it was going on. The bill before parliament was ultimately abandoned. In some of the plaintiffs' books,—those containing entries of materials and labour,—the cistern was described as "Thompson's Tank:" but in the journal and ledger, the work was charged to the company. It was admitted by the plaintiffs that they knew Thompson to be the agent of the company.

It was submitted on the part of the defendant, that, having thus dealt with Thompson, knowing him to be the agent of the company, the plaintiffs must be taken to have elected to treat him as their debtor, and, according to the cases of Patterson *v.* Gandasequi, 15 East, 62, and Addison *v.* Gandasequi, 4 Taunt. 574, could not afterwards sue the defendant.

*729] The learned judge intimated that the defendant should *have the benefit of the point, though in his opinion it was mixed up with the question of fact whether credit was given to Thompson at the time.

On the part of the defendant it was proved, that he consented to become a member of the provisional committee upon the distinct understanding with Thompson and Mullens that he was to be borne harmless; and that he never directly or indirectly authorized Thompson to pledge his credit for the work in question.

The learned judge left it to the jury to say whether Thompson had authority to bind the defendant, and whether the plaintiffs had given credit to Thompson.

The jury found that credit had not been given to Thompson; and they returned a verdict for the plaintiffs for the amount claimed, viz. 60*l.* 15*s.*

Byles, Serjt., in Michaelmas Term last, obtained a rule nisi for a new trial on the ground that the verdict was against the evidence, and also on the ground that the learned judge misdirected the jury, "in not telling them, that, if the credit was given by the plaintiffs to the agent, with notice of the facts, the plaintiffs could not afterwards sue the defendant."

Lush now showed cause.—The jury having found that in point of fact credit was not given to Thompson, the point as to misdirection hardly arises. The order for the cistern, it appears, was given by Thompson, who was known to be acting as the engineer of the company: and the contention at the trial, was, that the entry of Thompson's name in the plaintiffs' books was an election to treat him as their debtor. But the books in which Thompson's name appeared were books containing mere memoranda as to the labour and materials bestowed upon the works; and the entries did not profess to denote to whom credit was given for the work. In the journal and *ledger, the work was debited to "The Wandle Water Company." There is no pretence, [*730 therefore, for saying that the plaintiffs ever elected to charge Thompson and not the defendant. [WILLIAMS, J.—What authority had Thompson to pledge the defendant's credit?] There was abundant evidence of authority. [WILLES, J.—In Bailey *v.* Macauley, 13 Q. B. 815 (E. C. L. R. vol. 66), where this subject underwent much discussion, it was held, that, in an action against a member of the committee of a projected railway company, for work and labour, goods supplied, and money paid, the jury are to consider whether the defendant, by taking upon him the character of a committeeman, and afterwards acting in the affairs of the company, has authorized the company's solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company, and on its behalf; and, then, whether the credit was given on the faith of his being so personally responsible. Here, there was no holding out, no authority given by the defendant to Thompson, and no credit given on the faith of the defendant's being personally responsible.] The defendant was an assenting party to the application to parliament; and the work was done in furtherance of that application, and was essential. It was a thing done within the scope of the general authority of the agents and advisers of the company; and it was, with the express sanction and permission of the defendant, erected upon land which if not his own was at least in his occupation. [CRESSWELL, J.—It is clear that the defendant only consented to join the company upon the distinct understanding that he was not to be made personally responsible.] No doubt that was so as between him and Thompson and Mullens: but the plaintiffs' rights are not to be affected by any private arrangements of that sort. If there was no evidence of previous authority, *there was at all events ample evidence of subsequent [*731 ratification.

Byles, Serjt., and *J. Wilde*, Q. C., in support of the rule, were stopped by the court.

CRESSWELL, J.—We are all of opinion that there was no misdirection in this case: but we are equally clear that there was no evidence to

warrant the verdict. There must, therefore, be a new trial, the costs to abide the event.

WILLIAMS, J.—London juries have a great dislike to this sort of combination of attorneys and engineers in the getting up of companies. The parties had much better agree to enter a stet processus.

CRESSWELL, J.—The rule will be absolute for a new trial, unless the parties agree to a stet processus. Rule accordingly.

END OF HILARY TERM.

*IN THE EXCHEQUER CHAMBER. [*732

HILARY VACATION, 1857.

THE VAN DIEMEN'S LAND COMPANY *v.* COCKERELL. *Feb.* 4.

By an act incorporating a joint stock company, the directors were empowered to make calls, giving twenty days' notice of the time and place of payment in the London Gazette and in two or more of the daily London newspapers; and it was enacted, that if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should *absolutely forfeit* all his share in the capital stock of the company, and all profits and advantages thereof, to and for the use and benefit of the company; and all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the company, to the owner thereof, by notice in writing left at his *usual or last place of abode*, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen:"—

Held,—by the Exchequer Chamber, on error,—no absolute forfeiture until after the thirty days' notice.

A., B., & Co. carried on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in September, 1847, and, in March, 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, and in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was (but without the knowledge of A.) affixed to the office in Austin Friars, directing that letters and communications for A., B., & Co., should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; and, after A. left England, B. gave directions that letters and communications *for either of the partners* should be forwarded to D. (who had been a member of the firm); and D. gave directions that all letters or communications *for A.* should be forwarded to E.; but E. *had no authority to act for A. touching his private affairs.*

A. was the holder of 200 shares in the company incorporated by the above-mentioned act, and was one of the directors thereof. At a general meeting held in March, 1851, his shares were declared forfeited for non-payment of calls, and, on the 15th of May, 1852, a notice of the forfeiture, enclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it: and it never reached the hands or came to the knowledge of A.:—

Held,—by the Exchequer Chamber, on error,—not a sufficient service of the notice, although in the deed of transfer of the shares to him, in the resolution appointing him a director of the company, and in every document signed by him in relation to the affairs of the company, he was described as "of 8, Austin Friars."

And, held, that, in an action against the company for improperly withholding the shares after a tender of the sum due for calls and interest, A. was entitled to recover their value at the market price of the day of the tender, deducting the amount of the calls and interest.

THIS was an appeal against a decision of the Court of Common Pleas upon a special case stated in an action brought by the plaintiff below against the defendants below, a company incorporated by an act of the 6 G. 4, *c. xxxix., and a charter of King George the Fourth, in which action the plaintiff below charged the company with having [*733

wrongfully declared certain shares in the capital stock of the company to be forfeited: see the pleadings, 18 C. B. 454 (E. C. L. R. vol. 86). The case was as follows:—

At the times of the passing of the act and the granting of the charter, and for several years afterwards, the plaintiff carried on business in partnership with certain other persons, under the firm of Cockerell, Larpent & Co., at offices at No. 8, Austin Friars, in the city of London; and the plaintiff was the owner of 200 shares of the capital stock of the company.

Before the month of November, 1847, calls to the amount of 25*l.* had been paid on each of those shares. On the 4th of November, 1847, the 7th of June, 1849, and the 15th of August, 1850, calls of 1*l.* on each share of the stock of the company were duly made by the directors, and previous notice of the times and places of payment was duly given by advertisement, as directed by the act. These calls were payable on the 15th of January, 1848, the 18th of July, 1849, and the 25th of September, 1820, respectively. They have not been paid. The shares were 100*l.* shares.

The plaintiff proved that he did not know of the making of these calls, or any of them, except as in this case appears.

*734] At the annual general meeting of the proprietors of *the company held pursuant to their act on the 31st of March, 1851, the plaintiff's shares were declared forfeited; and the following declaration was made, and entered in the books of the company:—

"The chairman then informed the meeting that the directors had felt it their duty to propose for forfeiture certain shares on which more than one call was in arrear, to the number of 551, the particulars of which were read by the secretary, as follows:—[Here, amongst others, followed the number of the plaintiff's shares.] 200 shares late the property of John Cockerell, of 8, Austin Friars, in the city of London,—which were declared forfeited accordingly.

(Signed) "J. CATTLEY, Chairman."

In April, 1851, a call was in like manner made of 10*s.* on each share of the company; but no call was made on the plaintiff, or upon any shares as being his property, the directors and the company regarding his shares as forfeited.

At the annual general meeting of the proprietors held the 12th of March, 1852, the foregoing declaration at the meeting of March, 1851, was confirmed.

The firm of which the plaintiff was a member stopped payment in September, 1847. Its affairs were liquidated under an arrangement with their creditors under inspectors, of whom Mr. Horsley Palmer was one; and, after that month, the firm did nothing more than conduct to a conclusion the liquidation of their affairs for the benefit of their

creditors. The firm was dissolved in March, 1848. In winding up the affairs under the inspectors, Mr. Noble, one of the firm, was the most active, attending at the premises at Austin Friars almost every day. Mr. Noble had no authority to act for the plaintiff as to his private affairs.

The premises in Austin Friars were not closed until two or three years after the stoppage.

*A Mr. James Edward Coleman acted as accountant for the inspectors in regard to the affairs of the firm: but he did not act [*735 and had no authority to act touching the private affairs of any of the members of the firm; and he never had any communication with the plaintiff, and never saw him. Touching the private affairs of the plaintiff, a Mr. John Horsley Palmer, a merchant of London, acted as the friend of the plaintiff, and by his directions, in paying the trust dividends to his private creditors under a deed of arrangement hereinafter mentioned, and acted for him in nothing else.

No business connected with the private affairs of the plaintiff was transacted after the stoppage at the premises in Austin Friars. Letters addressed to him there, came there after he left England. The plaintiff left England in May, 1849, and went to reside on the continent, where he has ever since resided.

The plaintiff never slept at Austin Friars, or used the premises there otherwise than for business.

At the time of the stoppage of payment of the firm, the plaintiff occupied a house in Hyde Park Gardens, London, and another at Burton Hill, Wilts. He then gave up those houses, and afterwards became an inmate with his sister, at Loughton, Essex. He next went abroad; the premises in Austin Friars then being, and afterwards continuing to be, occupied as herein mentioned.

His shares were principally transferred to him. There were twelve deeds of transfer executed to and by him, in all of which he was described as of Austin Friars; and in the certificates of the same shares he was described as of Austin Friars. He was a director of the company from 1839, and attended several meetings. He was elected as of 8, Austin Friars. The plaintiff proved that notices and communications of every kind relating to the Van Diemen's Land Company were sent to his address there, *and that he never gave any directions [*736 that they should be sent in any other way.

Before leaving England, viz. on the 24th of November, 1848, the plaintiff made an arrangement with his private creditors, by a deed which was to be considered as part of the case.

A board, with an inscription of which the following is a copy, was affixed at the offices No. 8, Austin Friars, some time before May, 1852; but the precise time of its being affixed did not appear:—"Letters and

communications for Cockerell, Larpent & Co., to be left at the office of Mr. J. E. Coleman, 36, Coleman Street."

The plaintiff proved that the above board was put up without his knowledge or direct authority, otherwise than is to be inferred from the circumstances: nor did he know of the same until after the commencement of this action.

Before the plaintiff left England, it was the duty of the clerk at Austin Friars to forward all letters addressed to the plaintiff which came to Austin Friars, to the private residence of the plaintiff in Hyde Park Gardens, or the country.

After the plaintiff left England, Mr. Coleman gave directions that letters and communications for either of the partners should be forwarded to Mr. Noble, who had an office in the city; and Mr. Noble gave directions that all letters or communications for the plaintiff should be forwarded to the plaintiff's brother, Mr. S. P. Cockerell. Mr. Noble had no authority to act for the plaintiff touching his private affairs.

On the 15th of May, 1852, a clerk of the defendants' attorneys, on behalf of the defendants, went with the notice hereinafter mentioned to No. 8, Austin Friars, whereat the said business of the firm of Cockerell, Larpent & Co. had formerly been carried on, and, finding the office *737] shut up, and after seeing the said board, he *left with Mr. Coleman, at his office in Coleman Street, on the same day, a letter from the defendants' attorneys, of which the following is a copy:—

"19, Coleman Street,
"15th May, 1852.

"Dear Sir,—As we understand that the affairs of Messrs. Cockerell, Larpent & Co. are in your hands, may we request that you will procure the acceptance of service of the accompanying notice on behalf of Mr. John Cockerell. We enclose the notice in duplicate, and will thank you to get the receipt on the one copy signed by the party accepting the service.

"Bischoff & Coxe."

"J. E. Coleman, Esq."

In the letter was the following notice, in duplicate, addressed to the plaintiff, and signed by Mr. Cattley, the clerk of the defendants:—

"Sir,—By order of the court of directors of the Van Diemen's Land Company, I hereby give you notice, that, at a general court of proprietors of the said company, held on the 31st of March, 1851, it was, amongst other things, resolved, that, in consequence of your having neglected to pay the calls on the shares standing in your name, for the space of three calendar months next after the time appointed for payment thereof, the same shares, and all franchises and interest therein,

and all the profits and advantages thereof, and all moneys theretofore advanced on account thereof, should be absolutely forfeited to or for the use and benefit of the said company; and the same were thereby declared to be forfeited accordingly; and you were thereby declared disfranchised and removed from the said company: but no advantage will be taken of such forfeiture until after the expiration of thirty days from the date of this notice. Dated this 15th day of May, 1852."

No answer was sent to this letter; and the above notice *never came to the hands or knowledge of the plaintiff: and it was to [*738 be taken that the same was lost, without prejudice to any question of service of notice. Notice to produce it was duly given.

Mr. Coleman, who was examined as a witness on behalf of the defendants, said, that to the best of his recollection he forwarded the notice to Mr. Noble. Mr. Noble stated that he had no recollection of having received or seen any letter sent by Mr. Coleman to or for the plaintiff in 1852, and that he never saw a document like the above notice,—a copy of which was shown to him on his examination, by the defendants' counsel.

On the 20th of May, 1852, at a court of directors of the company, the following took place, and was duly entered in the books of the company:—

"The chairman informed the court that the secretary had attended at the office of the company's solicitors on Thursday, the 13th instant, and had there signed certain notices drawn up agreeably with the requirements of the act of parliament, addressed to those persons whose shares had been forfeited, as follows:—

"'Shares forfeited at the general meeting of proprietors, on the 31st of March, 1851,—

"'John Cockerell, 200 shares.'

"And the chairman further informed the court, that, after the expiration of thirty days from the delivery of the said notices, the shares would become finally and completely forfeited, unless payment of the overdue calls was made in the mean time."

Save as in this case appears, no notice of the forfeiture of the said shares of the plaintiff was ever given, nor did the plaintiff, or any other person authorized to act for him, know of the above resolutions until after this action was brought; nor did the plaintiff, or any person authorized to act for him, know of the alleged forfeiture until the end of the month of December, 1852, when *Mr. Palmer was verbally informed thereof, and thereupon communicated with the plaintiff. [*739

On the 11th of January, 1853, the plaintiff caused to be tendered to the defendants a sufficient sum to cover the amount of the calls on the 200 shares, with interest thereon from the time they were payable, and stated he did so to enable him to sell the shares. The defendants refused to receive the same, on the ground that they considered the shares

had been legally forfeited, and that they could not in any manner recognise the plaintiff's right to such shares.

It was proved by Mr. Wettenhall, a sharebroker called by the plaintiff, that the market-price of the shares on the day of the tender was 20*l.* a share. The price between that time and the time of trial fluctuated very much: they were as low as 14½, and as high as 26*l.* 10*s.* At the time of the commencement of the action, they were 14½, and at the time of the trial they were 13*l.* On the 5th of November, 1847, the prices were not quoted in the market. In June, 1849, after the second of the before-mentioned calls, they were worth 30*s.* On the 31st of March, 1851, they were worth 1*l.* or 1*l.* 10*s.* On March 12, 1852, and in May, 1852, the shares were not quoted at all: and the price of the shares did not rise until October, 1852; up to which date it was a fact that the shares were worth very little; that, until the following December, there was no quotation for them. They then rose to 5½, and on December 22d to 40*l.* In the quotation it is assumed that all calls are paid.

The amount of the verdict was taken, by direction of the Lord Chief Justice, subject to the opinion of the court. The shares were treated as worth 19*l.* each on the day of the tender; his Lordship suggesting,—which was agreed to,—that 1*l.* a share be deducted, to allow for a depreciation of the market by the selling of 200 shares at one time. The *740] value of the shares, after *allowing for the calls and interest, it was agreed would by this mode amount to 8000*l.*

The court was to be at liberty to draw all inferences that a jury would be justified in doing, and to have all powers of a judge at Nisi Prius as to amendment and otherwise.

The first question for the opinion of the court, was, whether the verdict was to stand for the plaintiff, or to be entered for the defendants, on any and what issues: If it was to be entered for the plaintiff,—secondly, upon what principle was the amount of damages to be ascertained.

If the court should be of opinion in the affirmative of the first question, the verdict was to be entered for the plaintiff according to the principle which the court might direct,—the amount to be settled by the court.

If the court should be of opinion in the negative of the first question, the verdict was to be entered for the defendants upon such issues as the court might direct.

The Court of Common Pleas having given judgment for the plaintiff upon this special case,—18 C. B. 454,—the defendants brought error, pursuant to the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 32, which now came on for argument before Coleridge, J., Erle, J., Martin, B., Crompton, J., and Watson, B.

Byles, Serjt. (with whom were *Hugh Hill*, Q. C., and *Unthank*, for

the plaintiffs in error.(a) The main *question is, whether the shares of the plaintiff below were forfeited. The material facts [*741 are these:—The act of parliament authorizing the incorporation of the company passed on the 10th of June, 1825. The charter of incorporation bears date the 10th of November in the same year. The plaintiff, who was a member of the firm of Cockerell, Larpent & Co., carrying on business at No. 8, Austin Friars, was the proprietor of 200 shares of 100*l.* each in the company, and was one of the directors. On the 4th of November, 1847, a call of 1*l.* per share was made, which was payable on the 15th of January, 1848. The firm of Cockerell, Larpent & Co. stopped payment in September, 1847; and the partnership was dissolved in March, 1848. On the 24th of November, 1848, the plaintiff executed a deed of arrangement with his private creditors. In May, 1849, he went abroad, and remained abroad until the time of the trial. On the 7th of June, 1849, a second call of 1*l.* per share was made, which was payable on the 18th of July; and on the 15th of August, 1850, a third call of 1*l.* per share was made, which was payable on the *25th of September. None of these calls having been [*742 paid by the plaintiff, at a general meeting of the proprietors of the company, held on the 31st of March, 1851, his shares were duly declared forfeited; and, on the 15th of May, 1852, a notice of the forfeiture was served in the manner stated in the special case,—upon which service a subordinate question hereafter to be noticed arises. In December, 1852, the shares, which were worse than valueless at the time of the forfeiture, had risen considerably in the market; and on the 11th of January, 1853, the plaintiff tendered the amount of calls and the interest, and demanded the shares,—with which demand the directors refused to comply. The validity of the forfeiture depends upon the construction of the 14th section of the act of parliament, by which it is enacted, "that if any subscriber or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, successors, or assigns, shall neglect or refuse to pay his, her, or their part or portion of the money to be called for by

(a) The points marked for argument on the part of the plaintiffs in error were,—

"That, by the company's act, 6 G. 4, c. xxxix., s. 14, the plaintiff's shares were absolutely forfeited on non-payment of the calls for three calendar months:

"That the plaintiff, who had so forfeited his shares, could not by his own act, as, by tendering the amount of calls, without the assent of the company, purge the forfeiture:

"That, until the company waive the forfeiture, the plaintiff has no right to sue the company on the footing of the plaintiff being entitled to the shares:

"That, as the plaintiff had forfeited his shares, and the company had not agreed to waive the forfeiture, the company and its officers had the right to refuse to receive from the plaintiff the calls, and had a right to remove his name from the register-book:

"That the notice in writing mentioned in the case was unnecessary, but was, if necessary, under the circumstances, sufficient, and was sufficiently served:

"And that if, by tendering the calls, and without the company's consent, the plaintiff could purge the forfeiture, then the shares still belong to the plaintiff, and he is not entitled to recover the full value of the shares,—a recovery in the present action for breach of duty, not having the effect of changing the property in the shares."

the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the appointed time of payment, then and in every such case the person or persons so neglecting or refusing *shall absolutely forfeit* all his, her, or their share or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company: and all shares which shall or may be so forfeited shall or may at any time or times thereafter be sold at a public sale, for the most money that can be gotten for the same, and the produce thereof shall go to and make part of the capital of the said company; *but no advantage shall be taken of such forfeiture of any* *743] *share or shares until after *thirty days' notice shall have been given* by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen; and that every such forfeiture so to be declared shall be an absolute indemnification and discharge to and for the proprietor and proprietors, or his, her, or their executors, administrators, successors, and assigns, so forfeiting, against all actions, suits, and prosecutions for any breach of contract or other agreement between such proprietor or proprietors, his, her, or their executors, administrators, successors, and assigns, and the said company with regard to the future carrying on and managing of the said company." The true and natural meaning of that section, it is submitted, is, that the shareholder has, besides the interval between the making of the call and the day on which the amount is payable, a further period of three months for paying the call *with interest;* and that, if the money is not paid within that period, the shares shall be absolutely forfeited for the benefit of the company, with a power of sale: but, inasmuch as it is right and reasonable that the party should have notice of the forfeiture before it is enforced, the statute provides that no advantage shall be taken of "such forfeiture" until after thirty days' notice given; and then it goes on to provide for the indemnification of the proprietor of the forfeited shares. The contention on the part of the defendant in error will be, that there is no absolute forfeiture of the shares by non-payment of the calls, until after the thirty days' notice has been given, and the shares have been declared forfeited at a general or special general meeting of the proprietors; and that the notice was *744] not well *served. The only reasonable construction of the statute, it is submitted, is, that the forfeiture is absolutely incurred immediately on default in payment within the three months next after the appointed time of payment,—at the election of the company. No

words could be stronger or more plain. It is like the ordinary case of a lease, to be absolutely void to all intents and purposes on breach by the lessee of any of the covenants: the lessee cannot take advantage of the breach; but the lease becomes void, at the election of the lessor: Doe d. Bryan *v.* Bancks, 4 B. & Ald. 401 (E. C. L. R. vol. 6): and see the cases collected in 1 Wms. Saund. 287 *d.* [CROMPTON, J.—You contend that there is no power to purge the forfeiture by payment of the calls before the expiration of the thirty days. If that be the true construction of the statute, what is the use of the notice?] The words upon which reliance will be placed on the other side,—"no advantage shall be taken of such forfeiture, until, &c.,"—coupled as they are with a power of sale, mean that no advantage shall be taken by sale of the forfeited shares until the prescribed notice has been given. The shareholder has three months after the call is payable within which to pay the amount; and three months more are to elapse before a declaration of forfeiture can take place. [MARTIN, B.—Would it be competent to the shareholder during or after the expiration of the second three months, but before the general meeting, to come and tender the amount due?] No. The forfeiture is absolute when the default is made,—absolute at the election of the company: but the power of sale does not come into operation until the declaration of forfeiture has been made, and notice thereof given: any other construction would make no distinction between the first and the second period of three months. [CROMPTON, J.—The time for election is, at the general meeting. Suppose no declaration of forfeiture then takes place, what becomes of the shares? They *are as they were. [CROMPTON, J.—May the company play fast and loose, waiting the turn of the market?] There is no [*745 injustice in that: and, at all events, it is an inconvenience which applies equally to either construction. Is the election to be given to the party who has made default, or to the company who have done no wrong? It is impossible to read the words "absolutely forfeited" in the sense of "liable to be forfeited," which is in truth the construction contended for on the other side. [WATSON, B.—The only notice which the shareholder has of the time and place of payment of the call, is, by advertisement in the London Gazette and in two or more of the daily London newspapers: s. 13.] That is the notice which the shareholder has agreed to be bound by. [MARTIN, B.—May not the true meaning of the 14th section be this,—the non-payment of the call within the first three months places the shareholder at the mercy of the company; but no forfeiture of the shares shall take place until the party has had thirty days' notice, such thirty days' notice to be given to him before the general meeting? That seems to make the whole consistent. ERLE, J.—It would be making "absolute" mean "inchoate." COLERIDGE, J.—It is impossible to give the literal construction to the words "no advantage shall be taken," &c.] In Sparks *v.* The Liverpool Water Works

Company, 13 Ves. 428, it was held that a shareholder was not entitled to relief against forfeiture under a by-law of an incorporated company for waterworks, providing that the members shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent; though the lapse arose from ignorance of the call, from accidental circumstances, and absence from town when the notice was sent. Sir W. Grant there said: "The parties might contract upon any terms they thought fit, and might impose terms as arbi-
*746] trary as they pleased. It is *essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals; much less in these undertakings. In particular cases, interest might be a compensation: but, in the majority of cases, it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence. The party making default is no longer a member; but, if a party can in equity enter into a discussion of the circumstances, each may bring his suit." [WATSON, B.—In whom do you say the property in the shares is vested during the three months preceding the general meeting?] They would be in the same position as the forfeited lease, where the lessor has not yet declared his election to avail himself of the forfeiture. [COLERIDGE, J.—There is no real analogy to the case of a lease. WATSON, B.—Suppose the company, after the time for payment of the call had arrived, and before payment, and before the time for holding a general meeting, came under the operation of the winding-up acts,—would Cockerell have been liable as a contributory?] Probably he would. Then, as to the notice. The case shows that the shares were duly declared forfeited, and that notice was duly issued: the only question is as to the service. [COLERIDGE, J.—The form of the notice seems to assume that the "forfeiture" was, the declaration of forfeiture made at the meeting.] The notice was served in the only way in which it could under the circumstances be served. The name of Mr. Cockerell stood in the books of the company as a director, and as residing at No. 8, Austin Friars.
*747] Twelve several deeds of transfer were executed to and by him, *in all of which he was described as of that place, as well as in the certificates of shares. In the deed of arrangement which he is stated to have executed, he is likewise described as of No. 8, Austin Friars. All communications addressed to him in connexion with the company, were addressed to him there. That, therefore, clearly was the proper place at which to serve a notice relating to the company. The firm having failed, the premises in Austin Friars were shut up, and there was no person there to receive the notice, but a board was stuck up, intimat-

ing that all communications for Cockerell, Larpent & Co., were to be addressed to 36, Coleman Street. [MARTIN, B.—Is this matter of law or of fact?] Of law, seeing that the statute requires the notice to be served at the last place of abode of the party. [MARTIN, B.—This notice was sent to No. 8, Austin Friars, four years after the premises were shut up. WATSON, B.—And it was not even left there.] The direction affixed there was complied with; but the notice seems never to have reached the hands of Mr. Cockerell. An office where a person is employed the greater part of the day, though he sleeps elsewhere at night, may properly be said to be his "place of abode:" Haslope *v.* Thorne, 1 M. & Selw. 103. What was done here would have been a good presentment of a bill made payable at the house in Austin Friars. [MARTIN, B.—Because it would be the acceptor's duty to have some person there to pay the bill. Taking the words of the 14th section *literally*, the notice would not be well served if it were put into the party's hands; yet nobody could doubt that personal service would do? The last place of abode of Mr. Cockerell, I should say, was, his sister's house at Loughton.] It is submitted that the notice was well served, or that the circumstances amounted to a dispensation with service. [COLERIDGE, J.—If, as you contend, No. 8, Austin Friars, was Mr. Cockerell's last place of abode, you should have *left the notice there.] In Crosse [*748
v. Smith, 1 M. & Selw. 545, notice to the drawers on non-payment of a bill of exchange, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked,—was held sufficent, without leaving a notice in writing, or sending it by post, though some of the drawers lived at a small distance from the place. Goldsmith *v.* Bland, Bayley on Bills, 6th edit. 276, is an authority to the same effect.

Montague Smith (with whom was *Barstow*), contrà, was not called upon.(*a*)

COLERIDGE, J.—I am of opinion that the judgment of the Court of Common Pleas in this case was perfectly *correct. The question [*749
as to the notice turns principally on the fact of service, which I think was insufficient. The main and important point, however, is as

(*a*) The points marked for argument on the part of the defendant in error, were as follows:—
"*As to the action*,—that, assuming a forfeiture of the shares had been incurred by non-payment of the calls in question, there had never been the thirty days' notice required by s. 14 of the company's act to entitle them to take advantage of such forfeiture; and that the facts disclosed by the special case showed, that, without such notice, the company had taken advantage of such forfeiture, to the plaintiff's damage:"

"*As to the damages*,—that, after tender, the plaintiff was entitled, as between him and the company, to all the rights of owners of the shares; that the case shows he might at the time of the tender have sold them at 20*l.* per share; and that, as against the defendants, he was entitled to take their value at no less than that sum; but that he was entitled to have them taken at the highest sum to which they rose before the commencement of the action, and that the time of the commencement of the action was not the proper time at which the calculation should be made."

to the construction of the 14th section of the statute 6 G. 4, c. xxxix., which enacts that a shareholder neglecting or refusing during the space of three calendar months next after the time appointed for payment of a call, to pay the same, with interest, "shall *absolutely forfeit* all his share or shares in the capital stock of the company, and all profits and advantages thereof, and all money theretofore advanced by him on account thereof." Undoubtedly, if those words had stood alone, there could be no question but that, by reason of the non-payment of the call, the shares ceased to be the property of the shareholder. But the words which follow make it impossible to put that construction upon the statute. I think the Court of Common Pleas were right in substantially holding that the forfeiture was no more than an inchoate forfeiture, available to the company only upon the performance by them of certain conditions, —with power to the party to come in in the mean time and purge the forfeiture by payment of the amount of the calls and interest. Those conditions are as follows; and they are prefaced by strong words—"No advantage shall be taken (meaning, by the company) of such forfeiture of any share or shares, until after thirty days' notice shall have been given by the directors of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode." That seems to be the first step to be taken by the company towards the forfeiture of the shares. The clause then goes on,—"nor," —and here is implied a repetition of the words in the former part of the sentence, 'no advantage shall be taken of such forfeiture of any share or shares,'—"unless the same shall be declared to be forfeited at some *750] general or special general meeting of the *said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen." Upon that the consequence follows to the defaulting shareholder, that he shall no longer have an interest in or be affected by the transactions of the company. It is the business of the court to give, if possible, a consistent construction to the whole of the clause: and we can only do that by holding the first part to be qualified by the subsequent words, and saying that, though the non-payment of the calls, with interest, within three months after the time appointed for payment thereof, operates an inchoate forfeiture, yet such forfeiture is not to be treated as absolute and indefeasible until the prescribed notice and declaration have been given and made. Independently, therefore, of the stringent consequences of holding the forfeiture to be absolute in the first instance, the language itself shows that it is to be dependent upon something which is to take place subsequently. And the reason for that is obvious enough; for, the 13th section provides that notice of the time and place of payment of the call shall be given "in the London Gazette, and in two or more of the daily London newspapers, as the said directors shall direct;" and that notice may never actually reach the shareholder, so as to enable him to pay the call within

the time prescribed. For these reasons, I am of opinion, that, in order to complete the forfeiture, the notice must be given, and the forfeiture declared, at the general or special general meeting of the proprietors. Upon this ground, therefore, I think the judgment of the court below was right, and must be affirmed.

MARTIN, B.—I am entirely of the same opinion: and I would only just add, that it is impossible to discover any sensible reason for requiring the thirty days' notice, unless this be the true construction of the 14th section *of the statute. If nothing that the shareholder could do would cure the forfeiture, it would be idle to give him notice. It could, therefore, only be given for the purpose of affording him an opportunity to come in and by payment in the interim avert the consequences of his default. [*751

CROMPTON, J.—The words of prohibition contained in the 14th section, —"no advantage shall be taken of such forfeiture of any share or shares, until after thirty days' notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode; nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen,"—seem to me to be conclusive. The company are taking advantage of the forfeiture, by withholding the plaintiff's shares. This they cannot do without first complying with the conditions prescribed by the statute.

WATSON, B.—The ground of forfeiture, is, the non-payment of the calls. The time and manner of working out the forfeiture are prescribed by the subsequent part of the clause.

Judgment affirmed, with costs.

Smith, for the defendant in error, asked for interest upon the judgment.

*COLERIDGE, J.—The amount of the judgment was matter of arrangement in the court below. [*752

MARTIN, B.—The plaintiff may be very well contented with what he has got.

Interest refused.

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to

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An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court:"—The court required it to be amended. *In re Thomas Simpson,* 554

II. *In answer to "new matter," under* 17 & 18 *Vict. c.* 45.

1. The proper time for an application for leave to file additional affidavits in answer to "new matter," under the 17 & 18 Vict. c. 125, s. 45, is, when the new matter has been brought before the court by the other side; and, *semble*, that these also may be answered at the proper time. *Swinfen* v. *Swinfen,* 364, 386 (*a*)

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AGENT.

I. *Employment of.*

1. Where an agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. *Prickett* v. *Badger,* 296

2. In such a case, a contract to pay what is reasonable is implied by the law: it is not a question for the jury. *Ib.*

3. *Semble*, per Willes, J., that, under such circumstances, the proper measure of damages would be the entire amount of the commission agreed for. *Ib.*

II. *Contract entered into by.*

1. A contract for the conveyance of goods from Liverpool to Australia was entered into as follows:—"It is this day mutually agreed between J. & R. W., owners of the ship Jessica, of the first part, and S. J. C. of the other part,"—that the ship should be ready by a given day to take on board certain specified goods, and should proceed therewith "to Geelong, in the colony of Victoria," and there deliver the same: "the rates of freight determined upon by *the said parties to this agreement*, are as under," &c.,—"*one-third to be paid in London, on receipt of bills of lading*, and the remainder by the Geelong and Melbourne Railway Company, at Geelong:" "goods to be taken on board at Liverpool at ship's expense:" and the agreement was signed,—"J. & R. W., S. J. C.:"—

Held, that S. J. C. was personally bound by this contract, and entitled to sue for a breach of it. *Cooke* v. *Wilson,* 153

2. Held, also, that the court were bound to take notice that "Geelong, in the colony of

Victoria," is a place out of England. *Cooke* v. *Wilson*, 153

3. A declaration by S. J. C., after setting out the above contract in hæc verba, averred, that, although the goods were in the care and custody of the defendants for the purpose of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect, and default, certain of them were damaged, &c.:—Held, that the declaration disclosed a breach of duty arising out of the contract, for which the defendants were liable to an action at the plaintiff's suit. *Ib.*

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I. *Duty of joint arbitrators.*

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II. *Reference under s.* 11 *of the Common Law Procedure Act*, 1854.

1. By a contract for the sale of a cargo of linseed cake (paid for on receipt of the shipping documents), it was provided that "any dispute as to quality, or as regards any question arising out of the contract, should be settled by arbitration in the usual manner, and that the contract should not be void on that account."

An action having been brought by the buyers to recover back the money paid, on the ground that the cargo was not of the description represented, but a mere spurious imitation of linseed cake,—*Quære*, whether the case was one in which the court had power to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), with a view to compel a reference? *Wallis* v. *Hirsch*, 316

2. But, held, that, there being a bonâ fide suggestion of fraud, the case was not one in which they would in the exercise of their discretion enforce the reference. *Ib.*

3. By a charter-party, it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners: and the charter-party contained a stipulation that "any question or difficulty which might thereafter arise out of that charter-party should be decided by arbitration," in a manner pointed out.

An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence:—Held, not a case for the application of the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Lury* v. *Pearson*, 639

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For disobedience of a rule of court.

1. The court will not dispense with *personal* service of a rule nisi for an attachment for disobedience of a rule. *Swinfen* v. *Swinfen*, 364

2. A compromise having been entered into by the plaintiff's counsel on her behalf at the trial, and embodied in an order of Nisi Prius, afterwards made a rule of court—upon a motion against her for an attachment for refusing to perform it, on the ground that it was done without her authority and against her express instructions:—Held, that the dissent of one of its members was enough to justify the court in declining to attach the plaintiff. *Ib.*

3. The order having been made upon the trial of an issue out of Chancery—*quære*, whether this court had jurisdiction to make it a rule of court, and whether the application to enforce it should not have been made to the court of equity? *Ib.*

4. As to how far counsel and attorneys may bind their clients by acts done by them in court, in the absence of *express* authority,—*quære*? *Ib.*

ATTORNEY.

I. *Authority of.*

As to how far attorneys may bind their clients by acts done by them in court, in the absence of *express* authority,—*quære*? *Swinfen* v. *Swinfen*, 364

II. *Negligence.*

1. An attorney received instructions to sue forty-five underwriters for particular average loss on certain policies on goods which had been shipped to Calcutta, and there sold. Having written ineffectually to each of them, demanding payment, he (under an impression that the only defence to be set up was a supposed set-off against the broker in whose name the policies were effected) sued out writs in the Lord Mayor's Court, though he knew that that court had no power to issue a commission for the examination of witnesses abroad. The actions (after consolidation) being defended, and a commission to examine witnesses at Calcutta being found necessary, the proceedings in the Lord Mayor's Court were necessarily abandoned:—

Held, that the attorney was guilty of crassa negligentia, and disentitled to sue his client for the costs of such abortive proceedings; and that it was no answer for him to say (upon the argument of a rule to set aside a verdict which had been found against him), that the diffi-

culty might have been got over by the removal of the causes by certiorari to one of the superior courts. *Cox* v. *Leech*, 617

2. But, held, that he was entitled to recover in respect of the letters before action. *Ib.*

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1. The mere fact that an action is pending upon an attorney's bill does not give a common law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. *Cowdell* v. *Neale*, 332

2. Whether charges for attendances, &c., in attempting to procure bail for a person who has been committed by a single magistrate for a breach of the peace, constitute charges for business done in a court of law, so as to enable a judge to refer the bill for taxation,—*quære?* *Ib.*

IV. *Answering matters.*

Upon a rule calling upon an attorney to answer matters, the charge against him being that he had received from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed,—it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge and pay the costs of the application. *In re Eyre*, 151

V. *Restoring to the roll.*

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court:"—The court required it to be amended. *In re Simpson*, 554

BANKRUPT.

Motion for costs under 12 *&* 13 *Vict. c.* 106, *s.* 86.

1. Upon a motion by a defendant for costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, on the ground that the plaintiff had without reasonable or probable cause made an affidavit in bankruptcy for a larger amount than he ultimately recovered, the verdict of the jury, though entitled to consideration, is not conclusive. *Gilbert* v. *Crosier*, 632

2. And, for the purpose of ascertaining whether or not there was reasonable or probable cause, the judge's notes of the trial may be had recourse to. *Ib.*

3. The plaintiff made an affidavit in bankruptcy, alleging the defendant to be indebted to him in the sum of 63*l.* 6*s.* At the trial, the jury returned a verdict for him for 10*l.* in addition to 37*l.* 10*s.* paid into court on a plea of tender. The judge who tried the cause reporting that he was of opinion there was evidence to show that the plaintiff was fairly entitled to recover the whole amount:—Held, not a case for costs under the 12 & 13 Vict. c. 106, s. 86. *Ib.*

And see SCOTCH SEQUESTRATION.

BENEFICE.

See SEQUESTRATION.

BENEFIT BUILDING SOCIETY.

Forfeiture of shares.

By one of the rules of a benefit building society, each member was to pay 10*s.* per share per month, together with certain fines in case of default; and it was provided that "any member not having executed a mortgage to the society as thereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for *six* consecutive monthly nights, should *thereupon* cease to be a member of the society, and forfeit all his or her interest therein." By other rules, the general management was vested in twelve directors, a meeting or quorum of whom was to consist of *five*.

The plaintiff, a member of the society (not having executed a mortgage), neglected for *seven* successive months to pay his monthly subscription in respect of a share held by him, but afterwards tendered the amount of his subscription, and the fines payable thereon, to *two* of the directors, who were in attendance for the purpose of receiving payments, and who accepted the same. At the first monthly meeting of the directors after the money was so paid, it was resolved that the plaintiff had on the sixth default ceased to be a member of the society, and forfeited all his interest therein; and it was ordered that his name should be erased, and the money received from him by the two directors be returned to him:—

Held, that the share was properly forfeited; that the acceptance of the money by the directors under the circumstances did not amount to a waiver of the forfeiture; and that the rule was not unreasonable. *Card* v. *Carr*, 197

BILL OF EXCHANGE.

Proof of consideration where bill forged.

To a count upon a bill of exchange, by endorsee against acceptor, the defendant pleaded, that he accepted the bill declared on and delivered it to the plaintiff in renewal of a former bill which purported to bear his acceptance, but which he subsequently discovered to be a forgery, of which he gave the plaintiff notice, that there never was any consideration for the drawing or endorsements of the bill, save as aforesaid; and that the plaintiff never gave value or consideration for the same, save as aforesaid.

Replication,—that, when the bill alleged to

be forged became due, the plaintiff, *then being the lawful holder thereof for value*, caused the same to be presented to the defendant for payment; that the defendant did not pay it, whereupon the plaintiff gave notice of the dishonour to the drawer and endorser; that the plaintiff, when he gave up that bill, had no notice or any reason to believe that it was forged; and that the defendant saw and inspected the bill, and did not allege that it was a forgery until after the lapse of thirty days.

Rejoinder,—that the defendant did not discover that his signature to the first bill had been forged, until after the lapse of the time mentioned in the replication:—

Held, that, upon these pleadings, the proper questions to be tried, were,—whether the bill first mentioned was a forgery,—and whether the plaintiff was the bonâ fide holder thereof for value; and that the onus of proving consideration lay upon the plaintiff. *Mather* v. *Lord Maidstone*, 273

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COMMON LAW PROCEDURE ACT, 1854.

Section 11. *Reference by agreement.*

1. By a contract for the sale of a cargo of linseed-cake (paid for on receipt of the shipping documents), it was provided that "any dispute as to quality, or as regards any question arising out of the contract, should be settled by arbitration in the usual manner, and that the contract should not be void on that account."

An action having been brought by the buyers to recover back the money paid, on the ground that the cargo was not of the description represented, but a mere spurious imitation of linseed-cake;—*Quære*, whether the case was one in which the court had power to stay the proceedings, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), with a view to compel a reference? *Wallis* v. *Hirsch*, 316

2. But, held, that, there being a bonâ fide suggestion of fraud, the case was not one in which they would in the exercise of their discretion enforce the reference. *Ib.*

3. By a charter-party it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners: and the charter-party contained a stipulation that "any question or difficulty which might thereafter arise out of that charter-party should be decided by arbitration," in a manner pointed out.

An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence:—Held, not a case for the application of the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. *Lury* v. *Pearson*, 639

Section 45. *Affidavits in answer to "new matter."*

4. The proper time for an application for leave to file additional affidavits in answer to "new matter," under the 17 & 18 Vict. c. 125, s. 45, is, when the new matter has been brought before the court by the other side; and, *semble*, that these also may be answered at the proper time. *Swinfen* v. *Swinfen*, 364, 386(*a*)

5. And see *In re Marriott*, v. *The London and South Western Railway Company*, 507

Section 50. *Discovery.*

See *Bird* v. *Malsy*, 308

Section 51. *Interrogatories.*

6. The court will not allow interrogatories, under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents. *Bird* v. *Malsy*, 308

Section 85,—*Equitable replication*,—see PLEADING, II.

COMPROMISE.

See COUNSEL.

CONSIDERATION.

Proof of,—See BILL OF EXCHANGE.

CONTRACT.

Construction of.

1. A contract by a manufacturer to furnish certain specified goods "as soon as possible," means, within *a reasonable time*, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand. *Attwood* v. *Emery*, 110

2. A. entered into a contract with B., to proceed to the east coast of Africa, and there procure and ship for B. in England, palm-oil and other produce,—A. to receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the *dry* merchantable palm-oil received by B.: the agreement further provided that A. should not be entitled to any commission on "any *wet*, dirty, or unmerchantable palm-oil" that might be received:—Held, that A. was entitled to no commission in respect of palm-oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price. *Warde* v. *Stuart*, 88

3. The plaintiffs contracted with the defendants to fit up for them the 'tween decks of an emigrant-ship, the work to be done to the satisfaction of the commissioners' surveyor, and to be paid for at the rate of 15*s.* "per statute adult:"—

Held, that the plaintiffs were only entitled to be paid at the stipulated rate for so many statute adult berths as the ship ultimately sailed with, and not for berths which had been erected and removed by order of the surveyor; and that they were not entitled to charge as extras those incidental accommodations which the passengers act required, inasmuch as they were either included in the contract, or not authorized by the defendants. *Dobson* v. *Hudson*, 652

And see INTEREST.

COPYRIGHT.

I. *Proprietorship of.*

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition. *Lover* v. *Davidson*, 182

II. *Evidence of assignment.*

A., being in New York, and wishing to publish a song there and in London simultaneously, entered into some agreement for an assignment of the *American* copyright to a publisher in New York:—Held, that a receipt for the purchase-money was no evidence of the assignment. *Lover* v. *Davidson*, 182

III. *Date of publication.*

Held, that the date on the title-page of a song (as required by the American law) was not conclusive evidence of the time of publication in New York. *Ib.*

IV. *Description of the author's place of abode.*

The author and proprietor of copyright in a song, in the entry at Stationers Hall described his place of abode as "65, Oxford Street," he being in America at the time of publication, and having no place of abode in England, but "65, Oxford Street," being the address of his publishers:—Held, a sufficient description to satisfy the 5 & 6 Vict. c. 45, s. 13. *Ib.*

COSTS.

I. *Taxation of.*

1. The mere fact that an action is pending upon an attorney's bill does not give a common law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. *Cowdell* v. *Neale*, 332

2. Whether charges for attendances, &c., in attempting to procure bail for a person who has been committed by a single magistrate for a breach of the peace, constitute charges for business done in a court of law, so as to enable a judge to refer the bill for taxation,—*quære?* *Ib.*

II. *On removal of cause from an inferior court.*

Quære, whether the 117th rule of H. 1853, which provides that, "if a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause," applies where the certiorari is obtained *by the plaintiff?* *Cox* v. *Leech*, 617

III. *Under* 12 & 13 *Vict. c.* 106, *s.* 86.

1. Upon a motion by a defendant for costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, on the ground that the plaintiff had without reasonable or probable cause made an affidavit in bankruptcy for a larger amount than he ultimately recovered, the verdict of the jury, though entitled to consideration, is not conclusive. *Gilbert* v. *Crosier*, 632

2. And, for the purpose of ascertaining whether or not there was reasonable or probable cause, the judge's notes of the trial may be had recourse to. *Ib.*

3. The plaintiff made an affidavit in bankruptcy, alleging the defendant to be indebted to him in the sum of 63*l.* 6*s.* At the trial, the jury returned a verdict for him for 10*l.* in addi-

tion to 37*l.* 10*s.* paid into court on a plea of tender. The judge who tried the cause reporting that he was of opinion there was evidence to show that the plaintiff was fairly entitled to recover the whole amount:—Held, not a case for costs under the 12 & 13 Vict. c. 106, s. 86. *Gilbert* v. *Crosier*, 832

COUNSEL.

Authority of, in the conduct of a cause.

1. A compromise having been entered into by the plaintiff's counsel on her behalf at the trial, and embodied in an order of Nisi Prius, afterwards made a rule of court,—upon a motion against her for an attachment for refusing to perform it, on the ground that it was done without her authority and against her express instructions:—Held, that the dissent of one of its members was enough to justify the court in declining to attach the plaintiff. *Swinfen* v. *Swinfen*, 364

2. As to how far counsel and attorneys may bind their clients by acts done by them in court, in the absence of express authority,—*quære?* *Ib.*

COUNTY COURT.

I. *Jurisdiction of.*

1. A friendly society enrolled its rules in 1832, under the 10 G. 4, c. 57, and shortly afterwards framed new rules, which were never enrolled or certified.

In an action in the county court, by a member against the stewards for sick pay,—Held, that the society was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63, s. 2; and, consequently, that the county court had jurisdiction, under the 41st section of that act. *In re Meredith and Whittingham*, 216

2. *Carrying on business.*]—A railway company does not "carry on business" (within the meaning of the 9 & 10 Vict. c. 95, s. 128), at a receiving-house or booking-office kept by an agent for the receipt and booking of parcels and packages for all the railways generally. *Minor* v. *The London and North Western Railway Company*, 825

II. *Appeal from decision of.*

Upon a case stated by way of appeal from a county court decision, it appeared, that, the defendant being indebted to the plaintiff, the latter drew upon him two bills, which the former returned accepted, and their receipt was acknowledged by the plaintiff in a letter (to which a penny receipt-stamp was affixed) stating that they were *placed to the defendant's credit.* The plaintiff afterwards enclosed the bills in a letter addressed to the defendant, with a request that he would re-accept them, making them payable at a banker's. It was proved that this letter was duly posted; but there was no evidence to show that it had ever come to the defendant's hands. After the bills had arrived at maturity, the plaintiff sued the defendant in the county court, upon the original consideration, for goods sold and delivered. At the trial, it was contended for the defendant, that, the bills having been given *in payment* pro tanto of the plaintiff's account; and being still in existence, the plaintiff could not without producing them recover upon the original consideration. The judge decided that the plaintiff's letter did not in point of law amount to an acceptance by him of the bills *in payment*, and decided that he was entitled to recover for the original consideration:—Held, that his decision was right. *Widders*, App., *Gorton*, Resp., 576

COVENANT.

Dependent Covenants.

1. Where a deed contains two covenants which cannot both be performed, they are dependent covenants. *Hemans* v. *Picciotto*, 646

2. The plaintiff declared upon a covenant whereby it was agreed that he should be paid 25,000*l.*, by monthly instalments, for certain services connected with the formation of a railway, and alleged for breach the non-payment of five of the monthly sums. The defendant pleaded, that, by the deed declared on, it was covenanted, that, in case for any reason the construction of the railway *should not be proceeded with*, the plans, specifications, &c., made by the plaintiff should be the property of the company, and, in case the whole 25,000*l.* should not then have been paid, it should be referred to one R. S. to say whether any and what further sum should be paid to the plaintiff; and averred, that, before any of the said five instalments became due, the said railway *was not proceeded with*, and that he was ready and willing to refer the matters to R. S.:—

Held, that the two covenants were not dependent covenants; and that the plea was a good answer to the declaration, although it did not aver that the plaintiff had notice (or knew) that the railway was not proceeded with. *Ib.*

DAMAGES.

Measure of.

1. Where an agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. *Prickett* v. *Badger*, 296

2. In such a case, a contract to pay what is reasonable is implied by law: it is not a question for the jury. *Prickett* v. *Badger*, 296

3. *Semble*, per Willes, J., that, under such circumstances, the proper measure of damages would be the entire amount of the commission agreed for. *Ib.*

4. In an action for the wrongful diversion of a stream of water, it is not necessary to show *actual* damage to the plaintiff's reversionary interest: it is enough to show an obstruction of his right, and, such obstruction of his right being shown, the law will infer damage. *Sampson* v. *Hoddinott*, 590

5. Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the bona fides of the application, cannot be looked at for the purpose of explaining or contradicting the evidence given at the trial. *Smith* v. *Woodfine*, 660

6. In such an action, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. *Ib.*

7. *Against a joint stock company for withholding shares.*]—In an action against a joint stock company for improperly withholding shares after a tender of the sum due for calls and interest, the proper measure of damages, is, the value of the shares at the market-price of the day of the tender, deducting the amount of calls and interest. *Van Diemen's Land Company* v. *Cockerell*, 732

DEED.

I. *Execution and delivery of.*

To a declaration upon an indenture, described as made between R. G. of the first part, the defendant and one T. L. of the second part, and the plaintiffs of the third part, whereby the defendant and T. L. jointly and severally covenanted with the plaintiffs for the payment by R. G. of certain annual premiums,—the defendant (setting out the indenture in hæc verba, showing that it was made between R. G. of the first part, the defendant and T. L. *and one Pearce* of the second part, and the plaintiffs of the third part), pleaded "that the said indenture was made and executed by him *in the faith* that Pearce should join therein and execute the same, and that Pearce never did join therein or execute the same:"—

Held, bad, it not appearing that the defendant's execution of the deed was *upon condition* that his execution thereof should be void, if the deed was not executed by Pearce, the other cosurety. *Cumberlege* v. *Lawson*, 709

II. *Parol agreement to vary.*

The plaintiffs replied, "on equitable grounds," that, after the making and executing of the indenture in the plea mentioned by the defendant and R. G. and T. L., and before the time for payment of the instalments had arrived, R. G. the defendant and T. L., having notice that Pearce had not joined in nor executed the indenture, by a note in writing consented and agreed that they would be liable upon the indenture, and that their execution thereof should be valid and binding upon them although Pearce had executed it; and that the plaintiffs relied and acted upon such consent and agreement:—*Quære*, whether the replication showed any equitable answer to the plea, if well pleaded? *Ib.*

And see COVENANT.

DEMURRER-BOOKS.

Delivery of.

The defendant's attorney having delivered all the demurrer-books, upon the plaintiff's default, the court refused to allow the plaintiff's counsel to be heard, or (his attorney not being at hand to pay for the books) to postpone the argument. *Simmons* v. *Siggers*, 583

DISCOVERY.

Under 17 & 18 *Vict.* c. 125, s. 50,—*See Bird* v. *Maby*, 368.

ECCLESIASTICAL BENEFICE.

See SEQUESTRATION.

ELEGIT.

Inquisition on.

1. Upon an inquisition on a writ of elegit, proof of possession or receipt of the rent of the land by the party, is primâ facie evidence of title. *Barnes* v. *Harding, Official Assignee of the Royal British Bank*, 568

2. Where a jury, notwithstanding such evidence, found that the party had no lands,—the court set aside the finding, and directed the sheriff to take a new inquisition. *Ib.*

EMIGRANT SHIP.

See CONTRACT, 3.

EQUITABLE PLEA.

See PLEADING, II.

EVIDENCE.

Mandamus or commission to examine witnesses abroad.

It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for argument. *Kelsall* v. *Marshall*, 266

And see ATTORNEY, II.

EXECUTION.

Against a shareholder,—See JOINT STOCK BANK, I.—JOINT STOCK COMPANY, I.

EXECUTORS AND ADMINISTRATORS.

Payment to Administrator.

1. *Semble*, that payment of a debt to an administrator to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing. *Prosser* v. *Wagner*, 289

2. The court refused to stay the proceedings in an action at the suit of an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed executrix, had intimated her intention to bring to this country to prove. *Ib.*

FORFEITURE.

See BENEFIT BUILDING SOCIETY.
And see JOINT STOCK COMPANY, II.

FORGERY.

See BILL OF EXCHANGE.

FRAUDS, STATUTE OF.

See SALE OF GOODS.

FRENCH LAW.

See PLEADING, II. 5.

"FREQUENTING."

See PRISONER.

FRIENDLY SOCIETY.

Construction of rules.

A friendly society enrolled its rules in 1832, under the 10 G. 4, c. 57, and shortly afterwards framed new rules, which were never enrolled or certified.

In an action in the county court, by a member against the stewards, for sick pay,—Held, that the society was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63, s. 2; and, consequently, that the county court had jurisdiction, under the 41st section of that act. *In re Meredith and Whittingham*, 216

And see BENEFIT BUILDING SOCIETY.

HUSBAND AND WIFE.

I. *Conveyance of wife's separate property under 3 & 4 W. 4, c. 74.*

1. *Affidavit.*]—The affidavit verifying the certificate of acknowledgment of a deed by a married woman before special commissioners under the 3 & 4 W. 4, c. 74, ought to show clearly that the persons who purported to have taken the acknowledgment were the commissioners named in the commission. *In re Vaughan*, 314

2. The court allowed a defect in that respect to be supplied by affidavit. *Ib.*

3. *Filing commission, &c., under s.* 85.]—The court allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, and the affidavit of verification, to be filed by the proper officer pursuant to the 3 & 4 W. 4, c. 74, s. 85, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn. *In re Sarah Chandler*, 323

4. *Under s.* 91.]—The court refused to grant a rule to enable a married woman to execute a conveyance under the 3 & 4 W. 4, c. 74, s. 91, without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent: but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so. *Ex parte Trenery*, 187

5. Upon a motion to dispense with the husband's concurrence in a deed for the conveyance by the wife of her separate property, the affidavit must contain the addition or description of the husband. *In re Sarah Gardner*, 215

II. *Authority of the wife to endorse bills.*

A bill was drawn by the Melbourne branch of the Bank of Australasia upon their house in London, in favour of a married woman, and remitted to her by her husband, and duly accepted by the London house. After the bill had been so accepted, and had been endorsed by the wife for value, but before its maturity, the husband (who had in the meantime arrived in this country) gave notice to the bank not to pay it, his wife having eloped. The bill becoming due, and the bank being sued by the endorsee:—Held, not a case for an interpleader,—the defendants having an interest in the subject-matter of the suit, and the question whether or not they were estopped from contesting the payee's right to endorse not being one which could be tried in an issue between the plaintiff and the claimant. *Baker* v. *The Bank of Australasia*, 515

INFERIOR COURT.

Costs on removal of cause from.

Quære, whether the 117th rule of H. 1853, which provides that, "if a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause," applies where the certiorari is obtained *by the plaintiff? Cox* v. *Leech*, 617

INJUNCTION.

See RAILWAY COMPANY, II.

INNKEEPER.

Lien of, for goods brought to the inn by a guest.

1. Goods brought by a guest to an inn are subject to the innkeeper's lien, though they may turn out to be the property of a third person. *Snead* v. *Watkins*, 267

2. One H., who had formerly been clerk to the plaintiff, an attorney, was subpœnaed as a witness in an action brought by his late employer to recover the amount of a bill of costs. H. put up at a public-house of entertainment at Westminster kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, H. became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against H.:—Held, that the claim of lien was valid. *Ib.*

INQUISITION.

See ELEGIT.

INSOLVENT DEBTOR.

I. *Interim order of protection.*

1. An interim order for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, operates only to protect the person of the petitioner and such of his property as by those acts vests in his assignees. *Parry* v. *Jones*, 339

2. Such order, therefore, does not prevent a creditor from issuing a sequestrari facias to seize the profits of a benefice after the insolvent's petition and before the final order. *Ib.*

II. *Description of debt in schedule.*

To a declaration by an endorsee of a *promissory note* for 1000*l.*, made by the defendant, payable to one *John* Jackson Lee, the defendant pleaded his discharge under the insolvent debtors act, 1 & 2 Vict. c. 110. The entry in the defendant's schedule, by which it was sought to support this plea, was,—"*James* Jackson Lee, of, &c., 1000*l.*, the amount of my *bond* given by me to this creditor for 725*l.* money lent," &c. The name of the plaintiff, who claimed as endorsee of the note, did not appear in the schedule at all:—

Held, not a sufficient description of the debt to sustain the plea. *Finney* v. *Lord Brownlow Cecil*, 117

INTEREST.

Contract for payment of.

The defendants entered into the following agreement with the plaintiff,—"In consideration of your discounting for us the under-mentioned bill, we do hereby undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 17*l.* 10*s.* for each month any portion of which shall have elapsed after maturity of the said bill and until the entire amount of same is wholly paid and satisfied: all payments made by us to be applied first in liquidation of interest, and afterwards in reduction of the said principal sum of 350*l.*"

In an action upon the above contract, for non-payment of the stipulated interest:—Held, that a plea showing that the plaintiff had endorsed over the bill to a third person, was a good answer, inasmuch as the interest could only be claimed as accessory to the bill. *Florence* v. *Drayson*, 584

And see *Florence* v. *Jennings*, post, Vol. II.

INTERIM ORDER.

See INSOLVENT DEBTOR, I.

INTERPLEADER.

Where granted.

A bill was drawn by the Melbourne branch of the Bank of Australasia upon their house in London, in favour of a married woman, and remitted to her by her husband, and duly accepted by the London house. After the bill had been so accepted, and had been endorsed by the wife for value, but before its maturity, the husband (who had in the mean time arrived in this country) gave notice to the bank not to pay it, his wife having eloped. The bill becoming due, and the bank being sued by the endorsee:—Held, not a case for an interpleader,—the defendants having an interest in the subject-matter of the suit, and the question whether or not they were estopped from contesting the payee's right to endorse not being one which could be tried in an issue between the plaintiff and the claimant. *Baker* v. *The Bank of Australasia*, 515

INTERROGATORIES.

Under the 17 & 18 Vict. c. 125, s. 51.

The court will not allow interrogatories, under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents. *Bird* v. *Maley*, 308

ISSUABLE PLEA.

See PLEADING, IV.

ISSUE.

From Chancery.

An order of Nisi Prius embodying a compromise, having been made upon an issue out of Chancery,—*quære*, whether the Court of Common Pleas had jurisdiction to make it a rule of court, and whether the application to enforce it should not have been made to the court of equity? *Swinfen* v. *Swinfen*, 364

JOINT STOCK BANK.

I. *Execution against shareholders.*

1. *Right of creditor.*]—A creditor who has obtained judgment against a joint stock banking company, and has ineffectually issued execution against their property and effects, is, under the 7 & 8 Vict. c. 113, ss. 10, 13, entitled *as of right* to execution against a shareholder, on complying with the conditions imposed by the statute. *Morisse* v. *The Royal British Bank*, 67

2. And it is no answer to a motion for that purpose, that the affairs of the company are in course of arrangement under the winding up acts and under a fiat in bankruptcy, and that assets to a large amount are already in the hands of the official manager, and that there is reasonable ground to believe that within a short (but indefinite) time enough will be realized to meet all the engagements of the concern. *Ib.*

3. *Proof in Bankruptcy.*]—The 10th section of the 7 & 8 Vict. c. 111, which enacts that the rights of creditors as against the person, property, and effects of shareholders shall not be prejudiced or affected by proof under a fiat against the company, and that no execution shall be issued against the person, property, or effects of any member, until after proof of the debt under the fiat, is not repealed by the 182d section of the general bankrupt act, 12 & 13 Vict. c. 106, which enacts that the proving or claiming a debt under a fiat shall be deemed an election by the creditor to take the benefit of such fiat,—that provision being merely a re-enactment of the 59th section of the 6 G. 4, c. 16. *Ib.*

4. *Memorial.*]—The 16th section of the 7 & 8 Vict. c. 113, which prescribes the form of memorial to be filed at the stamp-office, is *directory* only; an inaccuracy, therefore, in the heading,—*ex. gr.* a reference to the 7 G. 4, c. 46, instead of to the 7 & 8 Vict. c. 113,—does not prevent its being evidence against the persons therein named as shareholders. *Dossett* v. *Harding*, 524; *Powis* v. *Harding*, 533

5. Whether s. 21 makes it *conclusive* evidence, —*quære?* *Dossett* v. *Harding*, 524

6. A shareholder whose name is properly inserted in the last return or memorial filed at the stamp-office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares. *Ib.*

7. *Notice of application.*]—It is no objection to the notice of an intended application against a shareholder, under the 7 & 8 Vict. c. 113, that it intimates an intention to apply "to the court *or* to a judge thereof." *Bendy* v. *Harding*, 551

8. It is no objection to the notice, under s. 13, that it intimates an intention to move against *two persons*, and the application is confined to *one*. *Dossett* v. *Harding*, 524

9. In the notice of the intended application against a shareholder under the 7 & 8 Vict. c. 113, the party was described as "John Marshall." In the memorial last filed he was described as "John S. Marshall." There was an affidavit of identity:—Held, that the notice was sufficient. *Thomson* v. *Harding*, 555

10. *Service of Notice.*]—*Personal* service of the ten days' notice required by s. 13 is not necessary: it is sufficient if the notice is left with a servant at the dwelling-house of the person sought to be charged. *Morisse* v. *The Royal British Bank*, 67

11. *Fraud.*]—It is no answer to a rule for execution against a shareholder in a joint stock banking company, that the party against whom the execution is sought was induced to become a shareholder by the false and fraudulent representations of the directors as to the solvency of the concern. *Powis* v. *Harding*, 533

12. *By elegit.*]—Upon an inquisition on a writ of elegit, proof of possession or receipt of the rent of the land by the party, is primâ facie evidence of title. *Barnes* v. *Harding*, 568

13. Where a jury, notwithstanding such evidence, found that the party had no lands,—the court set aside the finding, and directed the sheriff to take a new inquisition. *Ib.*

And see JOINT STOCK COMPANY.

II. *Action upon a judgment obtained against a colonial joint stock bank.*

By an act of the council of India, to enable the Union Bank of Calcutta to sue and be sued in the name of their secretary or treasurer, it was, amongst other things, enacted, that all actions, &c., against the company should be brought against the secretary or treasurer for the time being as the nominal defendant; that a memorial of the names, &c., of the directors, secretary, and treasurer, and of the several persons members and proprietors of the bank, should be enrolled in the manner therein mentioned; and that every judgment, &c., in any action, suit, or proceeding in India, against the secretary or treasurer, should (subject to the express provisions of the act) "have the like effect and operation upon and against the property and funds of the bank, as if such judgment, &c., had been made or pronounced against all its members, and as if all the members had

been parties before the court to such action, suit, and proceeding, and as if the act had not passed."

The act then provided, that, in case execution upon any judgment in such action, &c., obtained against the secretary or treasurer, should be ineffectual for obtaining satisfaction against the funds of the bank, execution might issue,—first, against proprietors for the time being,—and, that proving ineffectual, then against persons who were proprietors at the time of the contract: Provided that no such execution should issue against any other person than the actual party to the suit, without leave of the court in which the action was brought:—

Held, that there was nothing in the act to prevent a creditor having obtained a judgment against the secretary of the bank in India, from enforcing it by action against a shareholder in this country,—the special provisions as to execution merely regulating the mode of procedure in India; and that the non-enrolment of a memorial in pursuance of the act, was no answer to an action upon such judgment. *Kelsall* v. *Marshall*, 241

JOINT STOCK COMPANY.

I. *Execution against shareholders.*

1. *Who are liable.*]—One who has accepted shares in a joint stock company, but *has not signed the deed of settlement*, or any deed referring to it, is not a "shareholder" within the 7 & 8 Vict. c. 110, and consequently is not liable to an execution at the suit of a judgment-creditor of the company,—although his name appears as a shareholder in the return filed with the registrar of joint stock companies, pursuant to s. 41. *Bailey* v. *The Universal Provident Life Association*, 557

2. *Service of rule.*]—Service of a rule for an execution against a shareholder of a joint stock company, must be personal, or by leaving it at his place of abode: delivering it to his attorney, though at his request, will not do. *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company*, 409

II. *Forfeiture of shares.*

1. *Notice.*]—By an act incorporating a joint stock company, the directors were empowered to make calls, giving twenty days' notice of the time and place of payment in the London Gazette and in two or more of the daily London newspapers; and it was enacted, that if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should *absolutely forfeit* all his share in the capital stock of the company, and all profits and advantages thereof, to and for the use and benefit of the company; and all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the company, to the owner thereof, by notice in writing left at his *usual or last place of abode*, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen:"—

Held,—by the Exchequer Chamber, on error,—no absolute forfeiture until after the thirty days' notice. *The Van Diemen's Land Company* v. *Cockerell*, 732

2. *Service of notice.*]—A., B. & Co. carried on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in September, 1847, and, in March, 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, and in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was (but without the knowledge of A.) affixed to the office in Austin Friars, directing that letters and communications for A., B. & Co., should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; and, after A. left England, B. gave directions that letters and communications *for either of the partners* should be forwarded to D. (who had been a member of the firm); and D. gave directions that all letters or communications *for A.* should be forwarded to E.; but E. *had no authority to act for A. touching his private affairs.*

A. was the holder of 200 shares in the company incorporated by the above-mentioned act, and was one of the directors thereof. At a general meeting held in March, 1851, his shares were declared forfeited for non-payment of calls, and, on the 15th of May, 1852, a notice of the forfeiture, enclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it: and it never reached the hands or came to the knowledge of A.:—

Held,—by the Exchequer Chamber, on error,—not a sufficient service of the notice on A., although in the deed of transfer of the shares to him, in the resolution appointing him a director of the company, and in every document signed by

him in relation to the affairs of the company, he was described as "of Austin Friars." *The Van Diemen's Land Company* v. *Cockerell*, 732

3. *Damages.*]—And, held, that, in an action against the company for improperly withholding the shares after a tender of the sum due for calls and interest, A. was entitled to recover their value at the market price of the day of the tender, deducting the amount of the calls and interest. *Ib.*

JUDGES' NOTES.

May be had recourse to, upon a motion by a defendant for costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, for the purpose of ascertaining whether or not there was reasonable or probable cause for making the affidavit to the extent sworn to. *Gilbert* v. *Crozier*, 632

JUDICIAL NOTICE.

See AGENT, II. 2.

LANDLORD AND TENANT.

Small Tenements Act, 1 & 2 *Vict. c.* 74.

The 1st sect. of the 1 & 2 Vict. c. 74 enables a landlord whose tenant refuses to give up possession on the tenancy being duly determined by a legal notice to quit, to give him notice, "in the form set forth in the schedule," of his intention to proceed to recover possession under the act; and, provides, that, if the tenant shall not appear at the time and *place* appointed, and show reasonable cause why possession should not be given under the provisions of the act, upon proof of the holding and of the determination of the tenancy, &c., and upon proof of the service of the notice, and of the tenant's refusal to quit, the justices may issue their warrant, and give possession to the landlord.

The form of notice given in the schedule begins "I, ———, [owner, *or* agent to ———, the owner, *as the case may be*], do hereby give you notice," &c., and intimates that the party giving it will, "on ——— next, the ——— day of ———, at ——— of the clock of the same day, at ———, apply to Her Majesty's justices of the peace acting for the district of ———, in petty sessions assembled, to issue their warrant," &c.

By s. 3, the mere obtaining a warrant is declared to be a trespass, if the person to whom the warrant is granted had not at the time of granting it lawful right to the possession of the premises, although no entry should be made by virtue of the warrant.

And s. 6 enacts, that where the landlord, at the time of applying for the warrant, *had lawful right to the possession of the premises*, he shall not be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the act; but that the party aggrieved may bring an action on the case for such irregularity, or informality, in which the damage alleged to be sustained *thereby* shall be *specially laid.*

A declaration stated that the plaintiff, after the passing of the act, was tenant to the defendant of certain premises, and that the defendant caused to be served upon her a notice (setting out the notice), which commenced thus, "I, J. D., of Bradford, in the county of York, attorney and agent for and on behalf of Gregory Fox, of, &c., farmer, do hereby give you notice," &c., and informed the plaintiff that "I, as attorney and agent for the said Gregory Fox, shall, on Tuesday, the 1st day of January next, at 11 o'clock of the same day, apply to Her Majesty's justices of the peace acting in and for the borough of Bradford (being, &c.), in petty sessions assembled, to issue their warrant," &c. The declaration then went on to state that the defendant, without the plaintiff having appeared before such justices, or having been heard to show cause, or had any means or opportunity to show cause, against the issuing of such warrant as in the notice mentioned, procured to be issued and executed on the plaintiff a certain warrant (setting it out), whereby and under the authority of which proceedings the plaintiff was forcibly ejected and expelled from the premises:—

Held, that the notice was informal, for not mentioning the *place* in the borough of Bradford where the application was to be made; and also, *come semble*, for omitting to state that J. D., the person giving the notice, was agent to *the owner* of the premises. *Delaney* v. *Fox*, 166

Held, also, that the count, though somewhat informal, was a good count in *trespass.* *Ib.*

The defendant pleaded, that the tenancy was duly determined by notice to quit before the happening of the matters in the count mentioned, and that, at the time of applying for the warrant, *he had lawful right to the possession of the premises*, which were wrongfully held over by the defendant:—Held, that the plea was a good answer to the action,—the 6th section of the statute confining the tenant's remedy, where the landlord has lawful right to the possession, to an action upon the case founded on the special damage arising to him from the irregularity or informality of the proceeding, and no special damage being alleged in the count. *Ib.*

As to the right of a tenant to maintain trespass against his landlord for a forcible expulsion, where the landlord has a legal right to the possession of the premises,—*quære?* *Ib.*

LIBEL.

Justification.

The defendant published of the plaintiff,

coal-merchants, what purported to be a report of an inquiry before a board of guardians respecting the fraudulent conduct of the plaintiff's agent, who, in performance of a contract for "best coals," had delivered at the workhouse coals of an inferior description, and (by falsifying the weighing-machine by means of a wedge) deficient in weight.

The libel commenced, "The way in which Messrs. P. (the plaintiffs) do things at Guildford. Inserting the wedge:" and ended with a recommendation of one of the guardians to "have nothing more to do with Messrs. P.,"—innuendo, "the defendant meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed to carry on their said trade there improperly and fraudulently."

The defendant pleaded a justification, following the innuendo, and saying that the coals delivered, as mentioned in the libel, were inferior in quality, *as the plaintiffs well knew*, and deficient in weight.

The judge ruled, that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it; and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shown some complicity on their part in the misconduct and fraud imputed to their agent.

The jury having found for the plaintiffs,—Held, that there was no misdirection, and that the libel imputed *personal* misconduct and fraud to the plaintiffs. *Prior* v. *Wilson*, 95

LIEN.

See INNKEEPER.

LORD MAYOR'S COURT.

Practice of,—See ATTORNEY, II. 1.

MANDAMUS.

To examine witnesses abroad.

It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for argument. *Kelsall* v. *Marshall*, 266

MARRIAGE.

Breach of promise of,—See DAMAGES, 5, 6.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

I. *Judges.*

Death of Jervis, C. J., 1.
Death of Alderson, B., 363.
Resignation of Platt, B., 1.
Appointment of Cockburn, C. J., 2.
Appointment of Watson, B., 1.
Appointment of Channell, B., 363.

II. *Attorney and Solicitor-General.*

Sir R. Bethell appointed Attorney-General, 2
The Rt. Hon. J. A. S. Wortley appointed Solicitor-General, 2

III. *Serjeants.*

Death of Wilkins, Serjt., 363.

MEMORIAL.

Of shareholders,—See JOINT STOCK BANK, I. 4, 5, 6, 7.

MERCANTILE CONTRACT.

Construction of,—See CONTRACT, 2.

MISTAKE.

Money paid under mistake of fact,—See MONEY RECEIVED.

MONEY RECEIVED.

Action for, where maintainable.

In 1811, W. L., being possessed of certain premises under leases which would expire at Midsummer, 1854, granted to T. and E., respectively, an annuity of 222*l.* 4*s.* 5*d.* for three lives, to secure which he granted to each of them an underlease of the same premises for forty-three years, if the lives, or the survivor of them, should so long endure.

In 1827, the premises in the annuity-deeds mentioned were assigned to the plaintiff for the residue of the terms granted to W. L., subject to the annuities to T. and E., and to the underleases for securing the same.

In 1852, T. and E. were let into possession of the premises so underlet to them; and, in 1830, the plaintiff became tenant to them of part of the premises at the rent of 55*0l.*, payable to them in equal moieties.

T., the last survivor of the cestuis-que-vie in his annuity-deed, died in 1851; and, from the time of his death, down to the time of the expiration of the leases granted to W. L., one W. E., as their agent, applied for and received the rent of 55*0l.* from the plaintiff for them and the representative of E., and accounted for a moiety to each of them,—deducting certain payments thereout in respect of ground-rent, rates, taxes, insurance, repairs, and commission:—

Held, that the plaintiff was entitled, in an action for money had and received, to recover back the sums so paid by him under the mis-

taken impression that the right to receive them still continued,—deducting only the sums paid by the agent in respect of ground-rent, rates, and taxes. *Barber* v. *Brown*, 121

NEGLIGENCE.

In mooring a ship.

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton* v. *Denton*, 672

And see ATTORNEY, II.

NEW ASSIGNMENT.

See PLEADING, V.

"NEW MATTER."

See AFFIDAVIT, II.

NEW TRIAL.

On the ground of surprise.

Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the bona fides of the application, cannot be looked at for the purpose of explaining or contradicting the evidence given at the trial. *Smith* v. *Woodfine*, 660

NOTICE.

I. *Of application to charge a shareholder,—See* JOINT STOCK BANK, I. 7, 8, 9.

II. *Service of,—See* JOINT STOCK COMPANY, II.

NUISANCE.

Injury to reversion.

In an action by a reversioner, for an injury to his reversion, by the erection of workshops and a forge and chimney on land adjoining his houses, in the occupation of his tenants, and causing smoke to issue from the chimney, and making loud noises,—the evidence was, that the chimney was built by the defendant's landlord, and that large quantities of smoke issued from it in consequence of fires lighted by the defendant for the purposes of his trade, and that the plaintiff's tenants gave notice to quit:—

Held, that there was no evidence to go to the jury to prove injury to the reversion; for, that, to entitle the plaintiff to maintain the action, the injury complained of must be of a permanent character, and the only act chargeable to the defendant, the lighting the fires, not being in its nature permanent. *Simpson* v. *Savage*, 347

And see WATERCOURSE.

OBITUARY.

Death of Jervis, C. J., 1.
Death of Alderson, B., 363.
Death of Wilkins, Serjt., 368.

OMNIBUS.

See RAILWAY COMPANY, II. 18.

PAYMENT.

I. *Evidence of.*

Upon a case stated by way of appeal from a county court decision, it appeared, that, the defendant being indebted to the plaintiff, the latter drew upon him two bills, which the former returned accepted, and their receipt was acknowledged by the plaintiff in a letter (to which a penny receipt-stamp was affixed) stating that they were *placed to the defendant's credit*. The plaintiff afterwards enclosed the bills in a letter addressed to the defendant, with a request that he would re-accept them, making them payable at a banker's. It was proved that this letter was duly posted; but there was no evidence to show that it had ever come to the defendant's hands. After the bills had arrived at maturity, the plaintiff sued the defendant in the county court, upon the original consideration, for goods sold and delivered. At the trial, it was contended for the defendant, that, the bills having been given *in payment* pro tanto of the plaintiff's account; and being still in existence, the plaintiff could not without producing them recover upon the original consideration. The judge decided that the plaintiff's letter did not in point of law amount to an acceptance by him of the bills *in payment*, and decided that he was entitled to recover for the original consideration:—Held, that his decision was right. *Widders*, App., *Gorton*, Resp., 576

II. *Made under mistake of facts,—See* MONEY RECEIVED.

PLACE OF ABODE.

See COPYRIGHT, IV.

PLEADING.

I. *Declaration for breach of contract.*

A contract for the conveyance of goods from Liverpool to Australia was entered into as follows:—"It is this day mutually agreed between J. & R. W., owners of the ship Jessica, of the first part, and S. J. C. of the other part,"—that the ship should be ready by a given

day to take on board certain specified goods, and should proceed therewith "to Geelong, in the colony of Victoria," and there deliver the same: "the rates of freight determined on by *the said parties to this agreement*, are as under," &c.,—"*one-third to be paid in London, on receipt of bills of lading*, and the remainder by the Geelong and Melbourne Railway Company, at Geelong:" "goods to be taken on board at Liverpool at ship's expense:" and the agreement was signed,—"J. & R. W., S. J. C.:"—

A declaration by S. J. C., after setting out the above contract in hæc verba, averred, that, although the goods were in the care and custody of the defendants for the purpose of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect, and default, certain of them were damaged, &c.:—

Held, that the declaration disclosed a breach of duty arising out of the contract, for which the defendants were liable to an action at the plaintiff's suit. *Cooke* v. *Wilson*, 153

II. *Plea or replication on "equitable grounds."*

A., B., and C. respectively drew, accepted, and endorsed a bill for 300*l.* for the accommodation of D. B. having paid the amount of the bill to the holder at maturity, sued A. (his co-surety) for contribution. A. pleaded, that, after the drawing, acceptance, and endorsement of the bill, and before it became due, D. became bankrupt, and after B. had so paid the bill, he agreed with the assignees of D., that, in consideration of their delivering up to him a certain building agreement then subsisting between him and D., he (B.) would pay them 150*l.* *and would relinquish* (amongst other things) *all moneys advanced to and for D., to wit, the* 300*l.* *so paid in satisfaction and discharge of the bill;* that this agreement was fully performed; and that thereby, and without the consent of A., D. and his estate were exonerated from the claim.

To this plea, B. replied "on equitable grounds," that the bill was drawn, accepted, and endorsed, and the amount paid by him, as alleged in the plea; that, before the bankruptcy of D., he had advanced him moneys to the amount of 2661*l.* 6*s.* 6*d.* to assist him to build certain houses pursuant to the terms of the building agreement mentioned in the plea, and had sold him timber and materials for the same purpose to the amount of 1512*l.*; that D. being so indebted to him in the sums above mentioned, and also in the sum of 300*l.* so paid by him in discharge of the bill, and in 136*l.* 17*s.* 4*d.* for moneys advanced to him for other purposes, it was agreed between him and the assignees of D. that the building agreement should be delivered up to him to be cancelled on his paying them 150*l.* in discharge of all claims which they might have on the houses and property comprised in the building agreement, and that he should relinquish all claim on the estate of D. for the moneys advanced by him to D. for the purpose of the erection of the said houses, and for the materials so supplied as aforesaid, but that such agreement did not extend to the 300*l.* paid in discharge of the bill, nor to the 136*l.* 17*s.* 4*d.*; that, with a view to putting that agreement into writing, the following memorandum was drawn up:—"It is hereby agreed between the assignees and B., as follows: that the building agreement for eighteen houses on land in, &c., be given up to B. to be cancelled, on payment by him to the assignees of 150*l.* in full for all claims they may have on the property; B. hereby relinquishing all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above-mentioned houses,"—that the memorandum was signed by him (B.) and the solicitors of the assignees in the belief that it was in conformity to the agreement so made as aforesaid; and that the same was worded as aforesaid by mistake and error, so as to include and relinquish his claims against D. and his estate on account of the 300*l.* paid by him (B.) in discharge of the bill, contrary to the true intention of B. and the assignees when they signed the memorandum; that B. never relinquished or gave up his said last-mentioned claim against D. and his estate, nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the memorandum so executed in error as aforesaid; and that the real and true agreement so made between B. and the assignees as aforesaid, *was in all respects performed and fulfilled* by the said parties thereto:—

Held, that the replication disclosed a good answer "on equitable grounds" to the plea,—whether the written memorandum did or did not include the claim for the 300*l.*; for, that the defendant, by demurring to the replication, admitted, that, if it did include that claim, it did so by mistake; and, *the agreement having been executed*, this court was bound to grant the plaintiff the same relief that the plaintiff would have been entitled to in equity, without compelling him to resort to a court of equity to reform it. *Vorley* v. *Barrett*, 225

2. A replication "on equitable grounds" may be a good legal as well as equitable answer to a legal plea: but, where the plea is pleaded "on equitable grounds," the replication must also be considered on equitable grounds. *Ib.*

3. To a declaration upon an indenture, described as made between R. G. of the first part, the defendant and one T. L. of the second part, and the plaintiffs of the third part, whereby the defendant and T. L. jointly and severally covenanted with the plaintiff for the payment by R. G. of certain annual premiums,—the defendant (setting out the indenture in hæc verba, showing that it was made between R. G. of the

first part, the defendant and T. L. *and one Pearce* of the second part, and the plaintiffs of the third part), pleaded "that the said indenture was made and executed by him *in the faith* that Pearce should join therein and execute the same, and that Pearce never did join therein or execute the same:"—

Held, bad, it not appearing that the defendant's execution of the deed was *upon condition* that his execution thereof should be void, if the deed was not executed by Pearce, the other cosurety. *Cumberlege* v. *Lawson*, 709

4. The plaintiffs replied, "on equitable grounds," that, after the making and executing of the indenture in the plea mentioned by the defendant and R. G. and T. L., and before the time for payment of the instalments had arrived, R. G. the defendant and T. L., having notice that Pearce had not joined in nor executed the indenture, by a note in writing consented and agreed that they would be liable upon the indenture, and that their execution thereof should be valid and binding upon them although Pearce had not executed it; and that the plaintiffs relied and acted upon such consent and agreement:—*Quære*, whether the replication showed any equitable answer to the plea, if well pleaded? *Ib.*

5. *Quære*, whether a plea to an action brought against a defendant in this country upon a contract made and executed in France, that the debt had been attached (saisie arrêtée), pursuant to the Code de Procédure Civile, by creditors of the plaintiff in that country, is any answer either legal or equitable? *Simian* v. *Miller*, 686

III. *Issuable Plea.*

1. Judgment having been signed on the ground that such a plea [as in II. 5.] was not issuable, the court set aside the judgment only upon the terms of the defendant bringing the amount claimed into court. *Simian* v. *Miller*, 686

2. Obtaining *leave to reply and demur*,—held to be no answer to the objection to the plea. *Ib.*

IV. *New Assignment.*

1. To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fellmonger, and returning it polluted to the stream when so used, and also a prescriptive right for twenty and forty years respectively.

The plaintiff new assigned "that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified."

At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it: but that, within the last twelve years, the tannery premises had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold.

Without leaving any thing to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues except the first and second:—

Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. *Moore* v. *Webb*, 673

2. And held, that the new assignment was well pleaded. *Ib.*

PRINCIPAL AND AGENT.

See AGENT.

PRISONER.

Commitment under the Vagrant Act.

A commitment under the Vagrant Act, 5 G. 4, c. 83, s. 4, stated that "T. C., on, &c., in this city (London), then being a reputed thief, *frequenting* the public streets and places of and in the said city, then and there *was found* in Railway Place, being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal," &c.:—Held, sufficient. *Ex parte Thomas Cross*, 573

PROBABLE CAUSE.

See BANKRUPT.

PROMOTIONS.

See MEMORANDA.

PROVISIONAL COMMITTEE.

See PUBLIC COMPANY.

PUBLIC COMPANY.

Provisional Committee-men.

A company was projected for the filtration and supply of water. Whilst the bill for its formation was before a committee of the House of Commons, the engineer (upon the suggestion of counsel) employed a builder to erect a cistern for the purpose of testing the process of filtration (for which the engineer had obtained a patent). The defendant was a member of the provisional committee, and the cistern was with his assent erected on land in his occupation:—

Held, no evidence to warrant a jury in inferring that the order for the work was given by the defendant's authority, or that the work was done upon his credit. *Patrick* v. *Reynolds*, 727

PUBLIC-HOUSE.

See INNKEEPER.

RAILWAY COMPANY.

I. *Place of business of.*

A railway company does not "carry on business" (within the meaning of the 9 & 10 Vict. c. 95, s. 128), at a receiving-house or booking-office kept by an agent for the receipt and booking of parcels and packages for all the railways generally. *Minor* v. *The London and North Western Railway Company*, 325

II. *Injunction under the Railway and Canal Traffic Act*, 1854,—17 & 18 Vict. c. 31.

1. The court refused to grant a writ of injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31, on the complaint of a company having a branch on a trunk-line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus, than they charged for the conveyance of passengers to the terminus of *another* branch line (in which they themselves were interested) extending over the same number of miles. *In re the Caterham Railway Company against the London, Brighton, and South Coast Railway Company, and the South Eastern Railway Company*, 410

2. To constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the *same* line or the *same portion* of the line. *Ib.*

3. To induce the court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line do not stop at the junction, or stop at inconvenient times, it must be distinctly shown that sufficient accommodation is not afforded to meet the fair requirements of the public. *Ib.*

4. It is no ground of complaint that the company working the main line refuse to grant third class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. *Ib.*

5. But, *semble* that it is a good ground of complaint that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation. *Ib.*

6. To justify the interference of the court to enforce the running of through trains on a continuous line of railways, under the second branch of the 17 & 18 Vict. c. 31, s. 2, it must be shown that *public* convenience requires it, and that it can reasonably be done. *In re Barrett* v. *the Great Northern Railway Company and the Midland Railway Company*, 423

7. They will not interfere at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route,—no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation. *Ib.*

8. In dealing with the first branch of the 17 & 18 Vict. c. 31, s. 2, which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic, or subjecting any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage,—the fair interests of the company are to be taken into the account. *In re Ransome* v. *the Eastern Counties Railway Company*, 437

9. A railway company made an agreement with A. to carry for him a large quantity of coals during three years from Peterborough to various places on their lines of railway, at certain rates.

B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway; and the company charged him a much larger sum per ton in proportion to the distance over which his coals were carried, than they charged to A.,—the professed object of the difference being to enable A. (whose coal came to Peterborough by railway) to compete in the coal trade of the district with B., who had the advantage of having his coals brought to Ipswich by sea:—

Held, that this was giving an "undue preference" to A. *Ib.*

10. *Quære*, whether a railway company may not charge different rates, where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, and where one party provides his own wagons and the other uses those of the company? See In re Oxlade, p. 454, *Ib.*

11. Upon a motion for an injunction against a railway company under the 17 & 18 Vict. c. 31, enjoining them,—"*first*, to carry upon their railway for the complainant such coal and coke as might be offered to them by him for that

purpose,—*secondly*, to charge for the carriage thereof respectively tolls *not higher* than the tolls charged by them for carrying coal and coke to persons for whom the same coal and coke were also carried on another railway forming a continuous line with theirs, and tolls not higher than the tolls charged by them to persons with whom they had private agreements for the carriage of coal or coke,—*thirdly*, to provide for the complainant depots for depositing and receiving his coal and coke on the stations of the railway similar to those provided at such stations for persons who consigned their coal and coke to the company,—*fourthly*, to afford to the complainant the same facilities for the receiving, forwarding, and delivery of his coals and coke upon and from the railway, as the company afforded to persons who consigned their coal or coke to the company,—*fifthly*, to provide for the complainant wagons, carriages, and trucks for the conveyance and carriage of his coal and coke, and forwarding the same upon the railway,—*sixthly*, to afford to the complainant all reasonable and proper facilities and accommodations for the unloading of his coals and coke at the various stations of the railway, and to afford to the complainant at the said stations the same facilities and accommodations for the unloading of his coals and coke as the company afforded to colliery owners or lessees of collieries, or to any other person,"—on cause being shown, it was referred to one of the masters to inquire and report upon the following questions:—

"*First*, whether any, and what, accommodation and facilities were provided or afforded at any, and what, stations on the line of the railway for the unloading of coal and coke, and for what persons and under what circumstances,—*secondly*, whether the company carried coals or coke for persons other than the complainant on any, and what, terms different from the terms on which the company had carried, or had offered to carry, coals and coke for the complainant,—*thirdly*, whether there was any, and what, difference between the circumstances under which the company had so carried coals and coke for such other persons, and the circumstances under which the company had carried, or had offered to carry, coals and coke for the complainant,—*fourthly*, whether, and in what manner, and how, the company were enabled by reason of such difference of circumstances so to carry coals and coke for such other persons at a cost to the company less than the cost to the company of carrying coals and coke for the complainant."

Upon the first point, the master reported as to the accommodation afforded by the company for unloading coals and coke at the different stations, that they ascertained as nearly as possible the consumption in the neighbourhood of each station, and the sort of coal required, and entered into terms with collieries having the particular description of coal, to supply the required quantity; that they appointed a depot agent to manage the sale of the coals so supplied through whom the orders were transmitted to the colliery, and who accounted to the colliery owners for the proceeds; that all the depots were allotted to such agent; that all coal dealers were treated alike; and that this course was adopted by the company for the purpose of preventing any obstruction of the general traffic of the railway:—

Held,—disposing of the fourth and sixth branches of the rule,—that this was not giving an undue or unreasonable preference or advantage to or in favour of any particular person or company, or subjecting any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. *In re Oxlade* v. *the North Eastern Railway Company*, 454

12. Upon the second point, the master found that the company charged for *through rates* ¾*d.* per ton per mile for coal and coke going south, unless their wagons were used, in which case they charged one eighth of a penny per ton per mile more for the first 100 miles, and one sixteenth for any distance beyond, and 3*s.* per day for demurrage on every wagon detained more than four days off the line; that there was no variation made in the charge to any one, except in the case of coals carried by the North Eastern Railway Company in conjunction with the Great Northern Railway Company through from the collieries to London, the North Eastern Railway Company's haulage ceasing at York, where their railway joined the Great Northern; such coal being made up into full trains, and the wagons for the entire distance being provided by the Great Northern Railway Company, for which the charge was ½*d.* per ton per mile for the whole distance,—the circumstances of the coals so carried being carried in entire trains, and at regular times, and without stoppages, enabling the company to carry them at such lower rate:—

Held, that it was sufficiently made out that the circumstances stated enabled the company to carry such coals at a cost less to them than the cost of carrying coals and coke for the complainant, and that by carrying them, under the circumstances stated, at such lower rate, no undue or unreasonable preference was given, or any undue or unreasonable disadvantage imposed. *Ib.*

13. The master also found that a similar arrangement was made with the Midland Railway Company, but not under the same circumstances, the inducement on the part of the company

being a *desire to introduce the northern coke into Staffordshire*:—Held, that lowering their rates *for that purpose* was giving an undue preference to that particular traffic,—there being no special circumstances affecting the pecuniary interests of the company to justify the course pursued. *In re Oxlade*, 454

14. As to the fifth branch of the rule (which was not referred to the master), viz. the complainant's demand to have wagons or trucks provided by the company for the carriage of his coal and coke:—Held, that the company were justified in refusing to furnish them, by the complainant's refusal to pay demurrage for the detention of the wagons beyond the time allowed by the regulations of the company. *Ib.*

15. Held also, that the company could not be called upon to carry coals to the extremity of their line (where it joined the Midland railway), and there shift them into other trucks or wagons, they having no convenience at that place for that purpose, and not affording such facility to any other person. *Ib.*

16. And, as to the first branch of the rule,—Held, that the company were not common carriers of coal. *Ib.*

17. And, the complainant having asked by the rule more than he was entitled to, and the company having been partially in the wrong, the court refused to allow costs to either. *Ib.*

18. A railway company made arrangements, at one of their stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers by any of their trains to and from K., and allowed A. the *exclusive privilege* of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office:—

Held, that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to another who also brought passengers from K. as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences contained in the 17 & 18 Vict. c. 31, s. 2. *In re Marriott* v. *The London and South Western Railway Company*, 499

19. As to costs, *see In re Oxlade*, 454, and *In re Marriott* v. *The London and South Western Railway Company*, 512

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Where a rule cannot be served, it may be amended and enlarged, even though it has run out. *Grissold* v. *Harding, Official Manager of the Royal British Bank*, 556

And see ATTACHMENT,—JOINT STOCK COMPANY, I. 2.

SALE OF GOODS.

Contract within the 29 *Car.* 2, *c.* 3, *s.* 17.

1. The defendant went into the plaintiff's shop, and agreed to purchase certain goods in the aggregate exceeding the value of 10*l.* The several articles, with their respective prices, were entered in the plaintiffs' "order book," *on the fly-leaf at the beginning of which were written the names of the plaintiffs*; and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain:—

Held a sufficient signature of the contract *by both parties* to satisfy the 17th section of the Statute of Frauds. *Sarl* v. *Bourdillon*, 188

2. One of the articles was described as "candlestick, complete." It was proved, that, at the time the goods were selected, it was arranged that a "gallery" should be added to the top of the candlestick for the reception of a "mosquito-shade:"—Held, that the memorandum was sufficient, without mentioning the "gallery." *Ib.*

3. At the time of the contract, it was agreed that the goods should be paid for by a check on the defendant's brother:—Held, that the omission of that stipulation did not vitiate the memorandum. *Ib.*

II. *Warranty on sale of a specific chattel.*

The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried

on business under the name of "The Smoke Prevention Company," the following written order,—"Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff,—to the effect that the patent article would consume smoke and effect a considerable saving in fuel,—as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—

Held, That no such warranty could be implied; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price. *Prideaux* v. *Bunnett*, 613

SCOTCH SEQUESTRATION.

Force and validity of.

The defendant was arrested on a ca. sa. upon a judgment obtained against him in this court, and was discharged by order of a judge, on the ground that he had at the time of the arrest obtained his protection from process under a Scotch sequestration. Upon a motion to rescind that order, and for leave to issue another ca. sa.:—Held, that it was not competent to this court to inquire into the trading upon which the sequestration was founded,—although fraud was suggested. *O'Brien* v. *Don*, 702

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An interim order for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, does not prevent a creditor from issuing a sequestrari facias to seize the profits of a benefice, after the insolvent's petition and before the final order. *Parry* v. *Jones*, 339

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Where a rule cannot be served, it may be amended and enlarged, even though it has run out. *Grissold* v. *Harding, Official Manager of the Royal British Bank*, 556

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WARRANTY.

On sale of a specific chattel.

The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order,—"Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff,—to the effect that the patent article would consume smoke and effect a considerable saving in fuel,—as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—

Held, that no such warranty could be implied; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price. *Prideaux* v. *Bunnett*, 613

WATERCOURSE.

I. *Rights of riparian proprietors.*

1. Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any mate-

rial injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. By usage, he may acquire a right to use the water in a manner not justified by his natural right: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. *Sampson* v. *Hoddinott*, 590

2. The plaintiff had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows; and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully:—

Held, that this detention of the water by the defendant was a use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action. *Ib.*

3. In such a case, it is not necessary to show *actual* damage to the plaintiff's reversionary interest: it is enough to show an obstruction of his right, and, such obstruction of his right being shown, the law will infer damage. *Ib.*

4. The right of the riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains. *Ib.*

II. *Immemorial or prescriptive right to the use of running stream.*

5. To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fellmonger, and returning it polluted to the stream when so used, and also a prescriptive right for twenty and forty years respectively.

The plaintiff new assigned "that he sued not only for the grievances in the pleas admitted and attempted to be justified, but for that the defendant committed the grievances over and above what the defences justified."

At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it: but that, within the last twelve years, the tannery premises had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold.

Without leaving any thing to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues except the first and second:—

Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. *Moore* v. *Webb*, 673

6. And held, that the new assignment was well pleaded. *Ib.*

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Section 27.—*Occupation as tenant.*

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